Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PHYLLIS R. CREGO *now* SOCK,

Petitioner

v.

KERMIT L. COLEMAN

On Petition For Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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178 pp

QUESTION PRESENTED FOR REVIEW

Whether Section 3 of the Michigan Paternity Act, which provided a statutory mechanism for the settlement of child support issues in paternity disputes between unmarried parents resulting in settlement agreements which were binding upon the mother and the child, is unconstitutional under the Equal Protection Clause of the 14th Amendment of the United States Constitution, when settlement of child support issues between children of divorced parents is not binding upon the mother and child, and may be modified upon any change in circumstances of the mother, father or minor child.

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II. THE DECISION OF THE MICHIGAN SUPREME COURT IS UNSOUND, AND CONTRARY TO THE REASONABLE IMPLICATIONS OF PRIOR PRECEDENT ESTABLISHED BY THIS UNITED STATES SUPREME COURT.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

PHYLLIS R. CREGO *now* SOCK, *Petitioner*

v.

KERMIT L. COLEMAN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

COMES NOW the Petitioner, Phyllis R. Crego *now* Sock, and respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (App., *infra,* 1a-43a) is reported at 463 Mich. 248; 615 N.W.2d 218 (2000). The opinion of the Special Panel of the Michigan

Court of Appeals (App., *infra*, 46a-92a) is reported at 232 Mich. App. 284; 591 N.W.2d 277. The opinion of the Michigan Court of Appeals (App., *infra,* 93a-108a) is reported at 226 Mich. App. 815; 1573 N.W.2d 291.

JURISDICTION

The Michigan Supreme Court entered its judgment on July 31, 2000. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

Section 3 of the Michigan Paternity Act, M.C.L.A. §722.713; M.S.A. §25.493, provided that "[a]n agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise . . . . The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child."

In contrast, Section 17 of the Michigan Divorce Act, M.C.L.A. §552.17(1); M.S.A. §25.97(1), provides that "[t]he court may, from time to time after its issuance, on the petition of either of the parents, revise and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children, as the circumstances of the parents, and the benefit of the children, require."

STATEMENT

The minor child, Angela M. Crego, was born out of wedlock on 16 August 1978 to the child's mother, Petitioner, Phyllis R. Crego, and Respondent, Kermit Coleman. Appropriately (2) two months subsequent to the baby's birth on 2 October 1978, a paternity action was prepared to be filed on behalf of the mother, Phyllis R. Crego, by the Wayne County Prosecutor's Office. Blood tests were administered at the time resulting in Kermit Coleman being determined to be the likely father of Angela M. Crego.

Kermit Coleman retained counsel and thereafter an agreement for payment of child support was entered under the Michigan Paternity Act at M.C.L.A. 722.713; M.S.A. 25.493. Ms. Crego was unrepresented by legal counsel at any time during these proceedings, and a guardian ad litem was never appointed to safeguard the interests of the minor child. Initially, the parties signed two (2) interim stipulations and thereafter a temporary order of filiation was entered on 26 September 1980. An order was entered by the Honorable

Harold Hood on 30 January 1981, which subsumed the interim orders. The 30 January 1981 order provided for payment of weekly child support in the amount of Fifty ($50) Dollars until the minor child of the parties "attains the age of 18 years or until further order of the court." (App., *infra*, 112a) There was no provision for medical care coverage. Kermit Coleman did not object or take action to set aside the second order which clearly suggested that the support amount could be modified by a subsequent order. Ms. Crego was told by the prosecutor handling the case at the time that she must accept the terms of the stipulated order. Mr. Coleman did not fully comply with the orders of the court for child support, and was show caused for failure to pay support as ordered on at least seven (7) occasions. When the child began school, it became clear that the support amount had become grossly inadequate under the circumstances. Ms. Crego lived with her daughter in a trailer park without even basic medical coverage, and she worked several jobs and cleaned other people's homes to attempt to support herself and her daughter. In stark comparison, Mr. Coleman expanded his business and real estate holdings to include a chain of produce stores bearing his name.

In July of 1987, Ms. Crego retained an attorney to petition to modify the support order to obtain an adequate level of support, but her attorney did not follow up on the petition, and there was no disposition. In August of 1990, she renewed her petition to modify the support order, but the petition was denied by the trial court pursuant to §3 of the Paternity Act, and ultimately resulted in this court's opinion in *Crego v. Coleman (Crego I)*, 201 Mich. App. 443, 506

N.W.2d 568 (1993). The *Crego I* majority, relying upon *Hisaw v. Hayes*, 133 Mich. App. 639, 350 N.W.2d 302 (1984), rejected her claim that M.C.L.A. §722.713; M.S.A. 25.453 denied illegitimate children their constitutional right of equal protection under the law (App., *infra*, 106a-107a).

Subsequently, on 19 May 1995, a different panel of the Michigan Court of Appeals in *Dones v. Thomas*, 210 Mich. App. 674; 534 N.W.2d 221(1995), declared §3 of the Michigan Paternity Act unconstitutional as violative of the constitutional guarantee of equal protection because it authorized nonmodifiable child support awards in paternity actions, while child support awards in divorce actions always remain modifiable. (App., *infra*, 140a). In light of the declaration of unconstitutionality of the statute by the Michigan Court of Appeals in *Dones*, the Michigan legislature repealed §3 of the Michigan Paternity Act effective June 1, 1997, eliminating the compromise settlement agreement option in paternity cases for all future disputes.

Based upon the fact that her case was nearly indistinguishable from *Dones*, Ms. Crego renewed her motion for modification of support and also sought to compel Mr. Coleman to provide medical insurance for his child. Judge Marianne O. Battani of the Wayne County Circuit Court (now a U.S. District Court Judge for the Eastern District of Michigan) concluded that the court should follow *Dones*, the more recent decision, and granted Ms. Crego's petition (App., *infra*, 111a).

Kermit L. Coleman, took an appeal of the trial court's decision in the Michigan Court of Appeals, and thereafter, an opinion was released by the appellate court on 14 November 1997, in *Crego v. Coleman (Crego II)*, 226 Mich. App. 815; 1573 N.W.2d 291 (1997). The Court of Appeals unanimously ruled that Sec. 3 of the Paternity Act was unconstitutional as violative of the equal protection guarantees of the United States and Michigan Constitutions, but nevertheless was compelled to reverse the trial court pursuant to Michigan Court Rule 7.215(H), which provides for the resolution of conflicts in opinions between different appellate panels in favor of the first published decision, unless the Chief Judge of the Michigan Court of Appeals polls all of the appellate court judges and determines that there is a basis to convene a special panel of the Court of Appeals to resolve the conflict between the cases (App., *infra*, 94a). Twelve days later, on 26 November 1997, the decision to reverse the trial court was vacated and a special panel was ordered to be convened to resolve the conflict between *Crego II* and the decision in *Crego I.* (App., *infra*, 93a).

Oral arguments were rendered before the Special Panel of the Court of Appeals on 29 April 1998, wherein Respondent's counsel alleged error on the part of the trial court and the opinion of the first panel of the Court of Appeals. On 23 October 1998, the Special Panel of the Court of Appeals issued its opinion affirming the reasoning of the appellate court in *Crego II*, and the decision of the trial court, in holding that the disparate treatment between children born to unmarried parents and those born to married

parents violated the federal and state constitutional rights to equal protection under the law. Quoting in part this Court's opinion in *Gomez v. Perez*, the court held as follows:

> In *Gomez v. Perez*, 409 U.S. 535; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973), the United States Supreme Court held that a state statute that granted legitimate a judicially enforceable right of support from their natural fathers but denied the right to children born outside the marriage was unconstitutional as a violation of the guarantee of equal protection. In so ruling, the Court stated:
>
> "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.' [*Id.*, at 538.]"
>
> With this we heartily agree. M.C.L.A. 722.713; M.S.A. 25.493 provides that, unlike legitimate children, children born outside of marriage not subject to a filiation order may be foreclosed from future modification of child support, regardless of need. This disparate treatment of children born outside marriage cannot withstand heightened scrutiny.

(App., *infra*, 54a-55a).

Respondent filed an application for leave to appeal the Special Panel's opinion and order, which was granted by the Michigan Supreme Court on 26 October 1999.

On 16 November 1999, the Michigan Court of Appeals again addressed the issue of the modifiability and retroactivity of child support orders in paternity cases, in *Sturak v. Ozomaro*, 238 Mich. App. 549; 606 N.W.2d 411 (1999). The Court in *Sturak* unanimously affirmed the unconstitutionality of Sec. 3 of the Michigan Paternity Act and the overruling of *Crego I*, and further held that full retroactivity was the best means to achieve the ends of justice (App., *infra*, 125a).

The case was brought before the Michigan Supreme Court, and resulted in the judgment from which this petition is filed. In a 4-3 decision, the high court overturned the Special Panel of the Michigan Court of Appeals in *Crego v. Coleman (Crego III)*, 232 Mich App 284; 591 N.W.2d 277 (1998) (App., *infra*, 46a-92a) In doing so, the court did not decide whether the statute created classifications based upon illegitimacy, and therefore whether the statute was subject to "rational basis" review or the "heightened" or "intermediate" standard of review, but held that the statute was not unconstitutional under either standard. Using rational basis analysis the court held that "[t]he statute in question takes cognizance of perhaps the central distinction between illegitimate and legitimate children--the formers' reduced lack of certainty regarding their paternity. By recognizing

this reality, and seeking to ameliorate its consequences, the statute, as applied, is rationally related to the state's interest in ensuring that illegitimate children are provided support. For these reasons, we conclude that the disputed statute satisfies a rational-basis standard of review." (App., *infra*, 20a.)

In finding that the statute in question satisfied a heightened level of scrutiny under Equal Protection Clause, the majority opinion of the Michigan court found that, in some sense, the statute operated not as a burden, but as a benefit to illegitimate children (App., *infra*, 23a). The court further found that an important governmental interest was served in "allowing parties to an agreement to order their conduct in reliance upon such agreements, and maintaining the integrity of such agreements." (App., *infra*, 25a.) This would be true even after the advent of testing which could render the underlying factual assumptions to the agreement false. (App., *infra*, 25a.) The court also proposed that an important governmental interest was served in allowing the mother of an illegitimate child to bind the child's alleged father to a support order, without a final determination of paternity, thereby affording enhanced opportunities for the support of illegitimate children from some source, even if the alleged father is not the actual biological father of the child. (App., *infra*, 26a.) Given the uncertainty of litigation, and the "proof problems" which existed prior to the acceptance of DNA testing, the court held that "the statute's purpose of providing support for illegitimate children is an important, and even compelling, state interest and that the challenged statute, as applied, substantially and directly advances this

important interest by providing an avenue to avoid problems associated with proving paternity, yet still provide support for the child." (App., *infra* 29a.)

The dissent by Justice Kelly, joined by Justice Cavanaugh, provided in part as follows:

> The majority's view is flawed. It is unreasonable to find that the statute did anything except distinguish the treatment of children on the basis of legitimacy. Although not all illegitimate children received disparate treatment under § 3, the dominant reality is that illegitimate children, and they alone, received disparate treatment. The majority acknowledges that 'there is no apparent set of circumstances under which a legitimate child would be the object of an enforceable, nonmodifiable support agreement."
>
> (App, *infra*, 31a.) (Footnote omitted).

Justice Kelly further addressed the issue of the "benefit" that was provided to out-of-wedlock children affected by this statute, by stating as follows:

> In *Gerhardt*, the defendant argued, as the majority concludes here, that the statutory provision gives illegitimate children an additional option in the form of a lump-sum settlement provision. 150 Wis. 2d at 571; slip op, p 33. The *Gerhardt* court, however, recognized the error in that argument.

"It is an option that has in reality worked to the detriment of many nonmarital children. It is, at best, an illusory benefit amounting to no benefit at all. It is, in reality, an additional burden. Similar to the procedural bars invalidated in the Clark line of cases, the lump-sum settlement provision deprives certain nonmarital children the opportunity to obtain adequate support. Although Clark and the cases cited therein deal with statutory limitation bars to the filing of actions, the bar to seeking additional child support that results from a lump-sum agreement works in precisely the same manner. Regardless of the label attached to the statutory bar, the result is the same. The nonmarital child, unlike the marital child, is barred from seeking additional support, regardless of need. That is hardly fair to the nonmarital child, much less constitutional. That is what the United States Supreme Court recognized in remanding this action, and that is what we recognize today. [150 Wis. 2d at 571-572 (emphasis added).]"

I agree with the Wisconsin Supreme Court that statutes such as § 3 violate an illegitimate child's right to equal protection of the law. Similar to the Wisconsin statute, § 3 actually limited the opportunities for illegitimate children to receive support from their putative fathers. It did so by foreclosing any opportunity for support orders to be modified beyond what was agreed to under conditions very likely unfavorable to both mother and child. It is unreasonable to

> believe that an agreement entered into at the onset of a child's life can accurately anticipate and provide for all the contingencies that child will face until reaching adulthood. Thus, I conclude that § 3 worked against and failed to be substantially related to the state's interest in procuring adequate child support for illegitimate children.
>
> . . . .
>
> Accordingly, I conclude that § 3 violated the right of illegitimate children to equal protection under the law. In so doing, I align myself with the position of three different panels of the Court of Appeals, the Illinois Supreme Court, and the Wisconsin Supreme Court. The majority decides to proceed down a different path. I would affirm the judgment of the Court of Appeals and remand for further consideration of the parties' arguments concerning retroactivity. I cannot follow the majority down a path that leads to a position contrary to the constitution.

(App., *infra*, 40a.)

Chief Justice Weaver, in a separate dissent, acknowledged the problems in proving paternity, but found the justification "neither 'sufficiently weighty nor substantially related to the limitation' to uphold M.C.L.A. §722.713; M.S.A. 25.493 under equal protection." (App., *infra*, 43a, quoting *Mills v. Habluetzel*, 456 U.S. 91 (1982)). In conclusion, Justice Weaver stated that "neither proof problems nor the interests of settlement and finality outweigh

the irrevocable and potentially damaging effect that a nonmodifiable settlement may have on the changing financial needs of illegitimate children. Consequently, the statute is not substantially related to the supposed interest it seeks to serve-namely, providing an additional mechanism for obtaining support for illegitimate children-and it should be determined to be violative of equal protection." (App, *infra*, 44a.)

REASONS FOR GRANTING THE PETITION

Despite the United States Supreme Court's rulings in *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988), there is a substantial disparity of opinion as to the appropriate standard of judicial review as applied to statutes which treat out-of-wedlock children differently from children of divorced parents, and under what circumstances is a statute "substantially related to an important government interest." This disparity exists between well-crafted opinions at various appellate level of state courts, and also between the Supreme Courts of different states. Very often, these varying decisions support their opposing opinions using the same legal precedents. Further guidance from this Court will have an impact on the lives of many citizens, including children, and provide elucidation of the court's position regarding the interpretation of other statutes affecting intermediate level classifications. Furthermore, the decision of the Michigan Supreme Court is erroneous, in view of the

decisions of this court in cases involving the treatment of out-of-wedlock children.

I. There Is a Split in Authority Among the Highest Courts of Several States as to the Constitutionality of Child Support Statutes Which Differentiate Between Illegitimate Children and Children of Divorced Parents.

The instant case has a history of fractured decisions at every level. When considering the opinions of the trial court judges and appellate court judges and justices who have actually rendered opinions in this case from *Crego v. Coleman (Crego I)*, *supra*, to the present, twelve (12) distinguished judges and justices have ruled in favor of unconstitutionality, and nine (9) have ruled against, on the facts of this specific case. This disparity of learned opinion is multiplied by other splintered decisions across numerous state jurisdictions.

The Wisconsin Supreme Court addressed the issue in *Gerhardt v. Estate of Moore (Gerhardt I)*, 139 Wis.2d 833, 407 N.W.2d 895 (1987), for its first analysis of the case. In *Gerhardt I*, the putative father admitted paternity and the mother of the out-of-wedlock child agreed to a lump sum settlement of gross child support and medical care reimbursement for $4,600.00. The settlement was approved by the trial judge pursuant to Chapter 52 of the Wisconsin

Statutes, which is substantially similar to the Michigan statute in question. The mother of the child subsequently sought to modify the prior order, claiming in part that the statute violated equal protection. In finding in favor of constitutionality, the Wisconsin Court responded that:

> This contention is totally without merit. Children born out of wedlock (in the absence of a lump sum settlement), like those born in wedlock may seek additional support from their father. *See* sec. 52.38, Stats. 1967; 36 Op. Att'y Gen. 222, 224 (1947); *State ex rel. Green v. Williams*, 49 Wis.2d 752, 759, 183 N.W.2d 37 (1971). Under sec. 52.38, paternity settlements are modifiable if they provide for periodic payments. While it is true that settlements which provide for a lump sum payment may not be modified, a lump sum settlement is merely one of the two types of settlements available to provide for the support of children born out of wedlock. A child born out of wedlock is not denied equal protection simply because the statutes provide an additional, optional method for satisfying a support obligation.
>
> *Gerhardt I*, *infra*, at 845, 846.

The mother of the child thereafter filed a petition for writ of certiorari with the United States Supreme Court, which by summary disposition, granted her petition, vacated the judgment of the Wisconsin Supreme Court, and remanded the case for further consideration in light of *Clark v. Jeter*, *supra*. *Gerhardt v. Estate of Moore*, 486 U.S. 1050

(1988).

On remand, the Wisconsin Supreme Court reexamined its prior analysis and concluded, under this Court's decision in *Clark*, *supra*, that a lump sum support provision which denied nonmarital children the right to seek additional support from their fathers, imposed an unconstitutional deprivation not shared by marital children, and hence was a violation of equal protection, in *Gerhardt v. Estate of Moore (Gerhardt II)*, 150 Wis.2d 563; 441 N.W.2d 734 (1989). The court rejected the position that the out-of-wedlock children were given some sort of benefit under the statutory scheme, when the claimed benefit was in reality a burden.[1] In addition, the court rejected the claimed "legitimate state interest" in reducing the burden on the state welfare system and the court system, when the opposite was true.[2]

The issue of non-modifiable child support agreements in paternity case was brought before the Nevada Supreme Court in *Willerton v. Bassham*, 111 Nev. 10, 889 P.2d 823 (1995). In *Willerton*, the putative father relied upon the Nevada state statute NRS 126.141(1)(b), to support his claim that a stipulated compromise agreement in a paternity action is binding upon the parties and the child, regardless of other circumstances. The legitimate purpose of the statute, according to the father, was to "encourage alleged fathers to

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[1] *Gerhardt*, at 738.

[2] *Gerhardt*, at 738, 739.

agree to a settlement when they would not otherwise do so, in the hope of obtaining a beneficial ruling with finality."[3]

The Nevada Court made only passing reference to equal protection, but analyzed the case in terms of the applicability of the principle of res judicata. The court discounted the putative father's position that the statute served the stated goals, by recognizing that even prior to the widespread use of deoxyribonucleic acid (DNA) testing as evidence in paternity, blood tests provided strong evidence of paternity, which overwhelmingly gave the advantage to the putative father under the statute by giving preclusive effect on the issue of paternity and non-modifiability of support.[4] The court held that, on the issue of modifiability, the periodic review provisions of Nevada law applied to compromise agreements under the paternity law, just as it applied to other forms of child support judgments or orders.[5] The mother was nonetheless precluded by res judicata from asserting a claim to determine paternity.

The Illinois Supreme Court decided the issue in *Dep't of Public Aid ex rel. Cox v. Miller*, 146 Ill.2d 399, 586 N.E.2d 1251 (1992). In 1978, the putative father and the mother of the child in *Cox* entered into a compromise agreement wherein the paternity action was dismissed with prejudice upon payment of $5,000.00 Thereafter, the State

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[3] *Willerton*, at 20.

[4] *Willerton*, at 21.

[5] *Willerton*, at 26.

of Illinois brought a paternity action against the putative father, requesting reimbursement for public assistance provided to the mother and child. In overturning the lower appellate court's determination that the claim was barred by the agreement, the Illinois Supreme Court cited the Wisconsin high court's decision in *Gerhardt*, *supra*, in acknowledging that "equal protection of the law would be violated if a right to seek support from their parents during the whole of their minority were granted to marital children but denied to nonmarital children."[6] The court did not find the Illinois statutory scheme unconstitutional, but found that the provision of the statute which allowed a child to bring an action to ascertain paternity at any time, the statute should be interpreted to allow for payment or modification of child support.[7]

In *Comm'r of Social Services v. Ruben O.*, 80 N.Y.2d 409; 605 N.E.2d 334; 590 N.Y.S.2d 847 (1992), the Court of Appeals of New York held that the state, as the assignee of the rights of a mother receiving public assistance, can compel a father to pay child support beyond that set forth in the court-approved compromise agreement pursuant to §516 of the New York Family Court Act. The court held that the state could pursue such a remedy, even if the mother of the child could not.

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[6] *Cox*, *supra*, at 410.

[7] *Cox*, *supra*, at 412.

In *Williams v. Lambert*, 46 F.3d 1275 (2nd Cir. 1995) the Second Circuit of the United State Court of Appeals, in interpreting §516 of the New York Family Court Act, held that the equal protection clause entitled the mother of an illegitimate child to have standing to pursue a claim for modification of support, despite statutory prohibition.

These cases illustrate the need for United States Supreme Court review. Application of the Equal Protection Clause of the Fourteenth Amendment at the state level is uncertain, at best, resulting in different justice being meted out between residents of different states. The issue goes beyond those cases involving modification of child support, but on the application of statutes involving classifications of illegitimates for purposes of intestate distribution, rights to claim death benefits, and other matters involving parentage. The Court should grant certiorari to provide clarity to the state courts to resolve these conflicts.

II. The Decision of the Michigan Supreme Court Is Unsound, and Contrary to the Reasonable Implications of Prior Precedent Established by this United States Supreme Court.

The Michigan Supreme Court declined to decide whether heightened scrutiny applied to out-of-wedlock children under the instant circumstances, as the Court held

that the statute was constitutionally permissible using either the rational basis standard or heightened scrutiny review. In holding that a rational basis standard might be appropriate, the Court reasoned that the focus of equal protection was on the statutory differentiation between two persons who are otherwise similarly situated, but have some unshared characteristic which forms the basis for the law. In the Court's view, relying upon *Geduldig v. Aiello*, 417 U.S. 484 (1974), illegitimate children for whom paternity was established are not included in the class of illegitimate children denied the right to modify child support based upon need, consequently the distinction in the law did not hinge upon the classification, and it was reasonable to conclude that a rational basis test could be applied. (App., *infra*, 28a). The Court's reasoning ignores the fact that illegitimate children are the only children who bear the burden of this statute. Further, *Geduldig* was a gender-based classification case which was decided before the court articulated a clear standard of review for classifications which have since been determined to require an intermediate level of judicial scrutiny, and 14 years before this Court formally adopted an intermediate standard of review for classifications involving illegitimate children in *Clark v. Jeter*, *supra*.

In judging that the statute would satisfy a heightened level of scrutiny nonetheless, the state court declared that providing financial support for children is a compelling governmental interest, and that the statute in question provides an alternative means of obtaining some support to mothers who may not otherwise be able to prove paternity is substantially related to the goal of providing children with

support. (App., *infra*, 17a). This view disregards the facts of this case and other similar cases. There are many documented instances where a paternity claim was paid off for as little as $2,500.00, which provides no real support at all for a child from birth to adulthood. There is no legitimate government interest served by having the taxpayers provide the necessary support for a child, when one of the parents is well-able to do so but was shrewd enough to make a deal without formally admitting paternity. As to the alleged proof problems associated with paternity cases, these have literally evaporated due to blood testing and DNA testing. The court was inaccurate in stating that "plaintiff faced significant obstacles to overcoming defendant's claim that he was not the child's father," when in fact human leukocyte antigen (HLA) blood testing was performed at the time, which determined that Mr. Coleman was the father of the child to a degree of confidence greater than 90%.

The Nevada Supreme Court addressed the issue of the state's asserted interest in encouraging settlements in *Willerton*, *supra*, as follows:

> It seems apparent, then, that the drafters of the model act envisioned widespread settlement of paternity claims on the basis of the strength and accuracy of blood test evidence, not based upon the mother's willingness to accept a final settlement agreement where the chances of establishing paternity at trial are weak or precarious. The facts of the instant case illustrate this result. The blood tests conducted during the pretrial proceedings

were compelling evidence that Keith might be the father. In the interpretation of blood test results, the results indicated a strong probability that Keith, as compared to the average random Caucasian male, was the father of Zachary.

If practice follows theory, and most paternity claims are to be settled on the basis of strong evidence, as in the instant case, then the statute would tip overwhelmingly in the alleged father's favor if given preclusive effect on both the issue of paternity and the nonmodifiability of the order. The alleged father would be able to secure a favorable ruling on paternity (a non-determination) even in the face of compelling evidence, and would also secure a "frozen" obligation of support. The mother and child would obtain support but without the option to modify the order. These results would obtain from a desire to avoid the "inconvenience and embarrassment" (whose we are not advised) of trial.

Willerton, *supra*, at 22, 23.

It is also difficult to ignore the injustice inherent in the court's approval of the averred governmental interest of the state in providing a statutory means for the allowing the child's mother to get some reduced amount of support, rather than risk getting no support from the putative father. Essentially, this means that the mother will get some compromised level of support from either the real father who will avoid be able to avoid having to pay the actual cost to care for the child, or receive some compromised level of

support from a person who was wrongly named as the child's father. It is hard to conceive how the proponents of this view could find either outcome to be compatible with justice and equity.

The state court also held that these compromise agreements under the statute are a matter of contract, and the state has an important governmental interests in giving force to an agreement when one party has ordered his conduct in reliance upon such an agreement, and was, in effect, "promised by a trial court judge that the level of child support imposed upon them would not be increased above the amount provided for in the settlement agreement." (App., *infra*, 25a). This argument disregards the fact that Respondent was put on notice of the mother's intention to seek judicial review of the inadequate child support amount in 1987, where it has been in various stages of litigation and appeal almost continuously since. The court fails to acknowledge that the children in these cases were not parties to the compromise agreements, and in Michigan, were not appointed counsel to safeguard their interests. In the case of Ms. Crego, not only was she not represented by counsel, but was told that she had to sign the agreement or lose her state assistance benefits. The father was represented by his own attorney throughout the brief proceedings.

The court's argument that the father should be entitled to the benefit of his bargain also fails to acknowledge recent state court rulings which have held that putative fathers may use DNA evidence to set aside judgments for paternity. The Maryland high court rendered

such a ruling in *Langston v. Riffe*, 359 Md. 396; 754 A.2d 389 (2000), where the court held that "there can be no vested interest in an erroneous declaration of paternity," and ruled that the judgment should be set aside. Under this view, a judgment of paternity is *res judicata* for all but the father, who can petition the court at any time to set aside the prior final determination. Some commentators believe that the trend is toward setting aside these judgments based upon the availability of reliable scientific testing.[8]

Further, when an agreement based upon a statute is irreconcilable with the constitution, the constitution prevails. This Court held in the Supremacy Clause case *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), that when the U. S. Supreme Court decides a case and applies the new legal rule of that case to the parties before it, the Supreme Court and other courts must treat such rule as retroactive and apply it to all pending cases, whether or not those cases involve predecision events.

This Court has repeatedly reaffirmed the principle announced in *Gomez v. Perez*, 409 U.S. 535 (1973), that "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Clark v. Jeter*, *supra*, set forth the standard of heightened scrutiny to be applied in equal protection cases involving illegitimate children, which was found by the state court to be inapplicable to these cases.

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[8] *Men Use DNA to Reopen Paternity*, Lawyers Weekly USA, October 16, 2000, at B12.

The decision of the Michigan Supreme Court in this case is inconsistent with the substance and analysis of the rulings of this Court, and should be vacated.

III. The Issue of Disparate Treatment of Illegitimate Children Regarding Their Ability to Obtain an Adequate Level of Support is Compelling.

Section 3 of the Michigan Paternity Act, and the similar statutory provisions in many several other states, is close to a guarantee of a childhood of poverty, and a reliance upon governmental assistance, with all of the attending social stigma and reinforcement of the cycle of public dependency. Statistics show that the poverty rate for children of unwed mothers is twice as high than that of children of divorced parents, and that racial minorities are disproportionately impacted by any law which, by design or application, imposes a disadvantage to children born out of wedlock. While the prior declaration of unconstitutionality of the statute by the Michigan Court of Appeals in *Dones v. Thomas*, *supra*, which was impliedly overturned by the Michigan Supreme Court's decision in this case five years later, did not result in an avalanche of petitions for modification, it stands to reason that the lives children involved in those cases were dramatically and immediately affected.

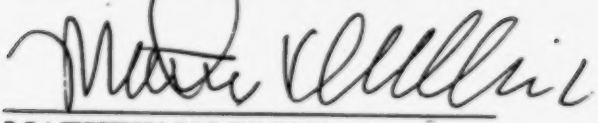
Moreover, there is considerable confusion at state court appellate levels as to the reading of this Court's precedents on the issue of illegitimates and equal protection, as set forth in *Labine v. Vincent*, 401 U.S. 532 (1971); *Weber v. Aetna Casualty*, 406 U.S. 164 (1972); *Gomez v. Perez*, *supra*; *Mathews v. Lucas*, 427 U.S. 495 (1976); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983) and *Clark v. Jeter*, *supra*, resulting in different forms of justice being handed down in different places. This case presents an opportunity for this Court to address these issues and provide uniformity and consistency between jurisdictions, in addition to providing justice to children who have started their lives at a significant disadvantage.

CONCLUSION

It cannot be disputed that Respondent enjoyed a substantial windfall that he would not have had if he had fulfilled his moral duty to this child by providing adequate support and health care coverage. For more than 12 years, Respondent's intransigence has resulted in his payment of litigation and appellate costs which might have paid his rightful support obligation twice over. Conversely, Petitioner has done everything anyone could be expected to do under the circumstances. Petitioner respectfully requests that this Honorable Court grant her petition for writ of certiorari.

Respectfully submitted,

ROBÉS & KOBLISKA, P.C.

BY: 

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Dated: October 24, 2000

No.

IN THE

Supreme Court of the United States

PHYLLIS R. CREGO *now* SOCK,

Petitioner

v.

KERMIT L. COLEMAN

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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STATE OF MICHIGAN

SUPREME COURT

PHYLLIS R. CREGO, a/k/a SOCK,

Plaintiff-Appellee,

v

KERMIT L. COLEMAN,

Defendant-Appellant.

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463 Mich. 248; 615 N.W.2d 218; 2000 Mich. LEXIS 1463

March 8, 2000, Argued
July 31, 2000, Decided
July 31, 2000, Filed

JUDGES: Chief Justice Elizabeth A. Weaver, Justices Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman. TAYLOR, CORRIGAN, and YOUNG, JJ., concurred with MARKMAN, J. KELLY, J. (dissenting). CAVANAGH, J., concurred with KELLY, J. WEAVER, C.J. (dissenting).

BEFORE THE ENTIRE BENCH

MARKMAN, J.

In this case, we are asked to consider the constitutionality of a repealed section of the Paternity Act, MCL 722.713; MSA 25.493,[1] which permitted a mother of a child born out of wedlock to enter into a nonmodifiable child support agreement with her child's putative father. We conclude that the statute in question did not violate equal protection guarantees.

I. Factual and Procedural History

In October 1978, plaintiff filed a paternity action, alleging that defendant fathered plaintiff's daughter who was born in August 1978. In 1980, the parties reached a settlement agreement, and the complaint was dismissed without having determined the issue of paternity. Through the settlement agreement, defendant agreed to pay weekly child support but did not acknowledge paternity. As required by MCL 722.713; MSA 25.493, the trial court approved the terms of the settlement and ordered defendant to pay child support of $20 a week, pending a formal recommendation from the friend of the court. A second order was later entered, increasing the support to $35 a week, and providing that the order was "not modifiable." Moreover, this second order provided that the matter "shall stand settled, discontinued, and dismissed" as to defendant. In January 1981, after receiving the friend of the court's support recommendation, the trial court entered a "permanent" order, requiring defendant to pay $50 a week until the child's eighteenth birthday or until further order of the court.[2]

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[1] The Legislature repealed the statute effective June 1, 1997, after a Court of Appeals decision finding the statute unconstitutional. Dones v Thomas, 210 Mich. App. 674; 534 N.W.2d 221 (1995).

[2] This order was not signed by the parties, nor did their attorneys approve the order as to form or substance. We express no opinion regarding the effect of this circumstance.

In the early 1990s, plaintiff filed a motion to modify the support order, but the trial court dismissed the motion on the ground of res judicata. A divided panel of the Court of Appeals affirmed the dismissal, holding that the nonmodifiable settlement agreement was binding on the parties. 201 Mich. App. 443, 447; 506 N.W.2d 568 (1993)(*Crego I*). Additionally, the Court rejected plaintiff's claim that MCL 722.713; MSA 25.493 was an unconstitutional denial of equal protection to illegitimate children. Id. at 446, citing *Hisaw v Hayes*, 133 Mich. App. 639, 642; 350 N.W.2d 302 (1984).

In 1995 however, in an unrelated case, the Court of Appeals reached the opposite conclusion when it held that MCL 722.713; MSA 25.493 violated the constitutional guarantees of equal protection because the statute authorized nonmodifiable child support awards in paternity actions, while child support awards in divorce actions always remain modifiable. *Dones v Thomas*, 210 Mich. App. 674; 534 N.W.2d 221 (1995). The Court did not make reference to its earlier decision in *Crego I*. In response to *Dones*, plaintiff renewed her motion for modification of child support, and the trial court granted the motion, concluding that it was required to follow the decision in *Dones*, even where that decision conflicted with *Crego I*. The trial court also held that the parties would be afforded an opportunity to resolve any issue regarding paternity through the use of DNA testing if they so desired.

On appeal, the Court of Appeals held that it would find the statute unconstitutional except that it was barred from doing so by MCR 7.215(H)(1), requiring the Court to follow *Crego I*, regardless of the *Dones* decision. 226 Mich. App. 815, 821, 573 N.W.2d 291 (1997)(*Crego II*). A conflict panel was convened to resolve the conflict between *Crego I* and *Crego II*, MCR 7.215(H)(3),[3] and that panel held that MCL

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[3] MCR 7.215(H)(1) requires that, "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990,

722.13; MSA 25.493 was unconstitutional as a violation of the equal protection guarantees of the United States and Michigan Constitutions. 232 Mich. App. 284; 591 N.W.2d 277 (1998) (*Crego III*). We granted leave to appeal. 461 Mich. 895, 603 N.W.2d 780 (1999).

II. Conflicting Statutory Child Support Provisions

The repealed section of the Paternity Act at issue here established a means of enforcing nonmodifiable child support agreements under certain circumstances:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child. [MCL 722.713; MSA 25.493 (emphasis added).]

It is important to recognize that the challenged statute was only relevant to nonmodifiable agreements where all the following elements were present: (1) a paternity action was

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that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."

filed; (2) the child's mother and putative father[4] voluntarily entered into an agreement regarding child support, in lieu of a judicial determination of paternity; (3) the circuit court made a determination that the agreement secured "adequate provision" for the child's needs; and (4) the agreement failed to include language preserving the right to modify support levels at a later time.

In the instant case, the parties expressly agreed to nonmodifiable support. Specifically, the stipulation provided that, "it is the intent of the parties that the attached order is not modifiable," and further provided that, "this matter shall stand settled, discontinued, and dismissed" against defendant.

Plaintiff bases her constitutional challenge on the interplay between several statutes providing mechanisms for obtaining child support. Child support may be established through one of three categories of support orders: (1) those entered pursuant to a divorce action; (2) those entered pursuant to a paternity action in which paternity has been established (through one of a number of available methods); and (3) those, as here, entered pursuant to a stipulation to dismiss a paternity action before determining paternity.

In the first category, children born or conceived during a marriage are deemed issue of the marriage,[5] and child support agreements entered in divorce actions always remain

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[4] Although the statute referred to an agreement reached with "the father" concerning child support, that language should be read to mean "putative father." The disputed provision only applied when a paternity suit had been filed, but a paternity determination had not yet been made. Common sense requires us to read this language to mean the "putative father," as no determination of paternity has been made when a paternity complaint is initially filed. Additionally, the statute appears to use the term "putative father" interchangeably with "father."

[5] This presumption is rebuttable. The Paternity Act is applicable where the presumption has been successfully rebutted.

modifiable, depending upon changed circumstances. This is made clear through the text of three separate statutory provisions. MCL 552.455(1); MSA 25.222(5)(1) explains the process through which predivorce temporary support orders may be modified; MCL 552.17(1); MSA 25.97(1) explains the process through which support orders entered pursuant to divorce may be modified by motion of the parties; and MCL 552.517; MSA 25.176(17) provides that postjudgment modifications to support orders may be made pursuant to friend of the court recommendations. These provisions, considered together, allow a circuit court to modify all child support agreements reached pursuant to a divorce action.

In the second category, child support orders remain modifiable where a final paternity determination has been reached by way of a formal paternity action. Such a determination may be made through a variety of methods. In the first of two statutory methods, the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.*, allows modification in cases where an order of filiation has entered:

> The court has continuing jurisdiction over proceedings brought under this act to increase or decrease the amount fixed by the order of filiation subject to section 7(3) or (4), and to provide for, change, and enforce provisions of the order relating to the custody or support of or parenting time with the child. [MCL 722.720(1); MSA 25.500(1).]

The second statutory category, also found in the Paternity Act, MCL 722.711 *et seq.*; MSA 25.491 *et seq.*, allows modification in cases where an acknowledgment of paternity has been obtained:

> An acknowledgment signed under this act establishes paternity, and the acknowledgment may be the basis for court

> ordered child support, custody, or parenting time without further adjudication under the paternity act . . . . The child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth. [MCL 722.1004; MSA 25.604.]
>
> Except as otherwise provided by law, a mother and father who sign an acknowledgment that is filed as prescribed in section 5 are consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child. [MCL 722.1010; MSA 25.610.]

It is the third statutory category of establishing child support--through orders entered pursuant to a voluntary stipulation to dismiss a paternity action before determining paternity--that is at issue in the instant case. Only in this statutory category are nonmodifiable support agreements permitted. It is important to note, however, that this third category of child support includes both modifiable and nonmodifiable support agreements. The statute does not require that such orders be nonmodifiable; it merely permits nonmodifiable orders, provided that the court determines that the parties' agreement adequately provides for the child.

III. Equal Protection Clause

The Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2. This Court has found

Michigan's equal protection provision coextensive with the Equal Protection Clause of the federal constitution. See, e.g., *Frame v Nehls*, 452 Mich. 171, 183; 550 N.W.2d 739 (1996) ("the Michigan and federal Equal Protection Clauses offer similar protection"); *Doe v Dep't of Social Services*, 439 Mich. 650, 670-671; 487 N.W.2d 166 (1992) ("a review of the jurisprudence and constitutional history of this state suggests . . . that our Equal Protection Clause was intended to duplicate the federal clause and to offer similar protection").

The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment. *Miller v Johnson*, 515 U.S. 900, 919; 115 S. Ct. 2475; 132 L. Ed. 2d 762 (1995); *El Souri v Dep't of Social Services*, 429 Mich. 203, 207; 414 N.W.2d 679 (1987). Conversely, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other, presumably more genuinely differentiating, characteristics. *Puget Sound Power & Light Co v City of Seattle*, 291 U.S. 619; 54 S. Ct. 542; 78 L. Ed. 1025 (1934). Moreover, even where the Equal Protection Clauses are implicated, they do not go so far as to prohibit the state from distinguishing between persons, but merely require that "the distinctions that are made not be arbitrary or invidious." *Avery v Midland Co, Texas*, 390 U.S. 474, 484; 88 S. Ct. 1114; 20 L. Ed. 2d 45 (1968).

When a party raises a viable equal protection challenge, the court is required to apply one of three traditional levels of review, depending on the nature of the alleged classification. The highest level of review, or "strict scrutiny," is invoked where the law results in classifications based on "suspect" factors such as race, national origin, or ethnicity, none of which are implicated in this case. *Plyler v Doe*, 457 U.S. 202, 216-217; 102 S. Ct. 2382; 72 L. Ed. 2d 786 (1982). Absent the implication of these highly suspect categories, an equal protection challenge requires either rational-basis review or an

intermediate, "heightened scrutiny" review.

A. Where rational basis applies

Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v Williams*, 397 U.S. 471, 485; 90 S. Ct. 1153; 25 L. Ed. 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich. 231, 271; 301 N.W.2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General*, 402 Mich. 554, 613-614; 267 N.W.2d 72 (1978). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich. 524, 542; 273 N.W.2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra.*

B. Where heightened scrutiny applies

The United States Supreme Court has recognized an intermediate level of review, between strict-scrutiny and rational-basis review, under which a challenged statutory classification will be upheld only if it is "substantially related to an important governmental objective." *Clark v Jeter*, 486 U.S. 456, 461; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988). This "heightened scrutiny" standard has been applied to legislation creating classifications on such bases as illegitimacy and gender. The standard recognizes that, while there may be certain immutable distinctions, for example, between men and

women or between legitimate and illegitimate children, that justify differing legislative treatments under some circumstances, the Legislature's authority to invoke those distinctions should not be viewed as an "impenetrable barrier that works to shield otherwise invidious discrimination." Gomez v Perez, 409 U.S. 535, 538; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973). See also, e.g., *Clark, supra*; *Mills v Habluetzel*, 456 U.S. 91; 102 S. Ct. 1549; 71 L. Ed. 2d 770 (1982); *Mathews v Lucas*, 427 U.S. 495, 505-506; 96 S. Ct. 2755; 49 L. Ed. 2d 651 (1976) (all applying heightened scrutiny to classifications based on illegitimacy). Thus, where an equal protection claim alleges unconstitutional treatment on the basis of illegitimacy, the Supreme Court has held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez, supra* at 538. However, where a challenged statute is substantially related to an important state interest, the statute should be upheld. *Mills, supra* at 98- 99.

IV. Problems in Characterization

A. General problems in characterization

Whether the Court uses a rational-basis or heightened scrutiny standard of review depends on the characterization of the statutorily created classifications. See, e.g. *Mathews, supra* at 504. Legislation, by its intrinsic nature, creates classifications, typically resulting in benefits or detriments to defined classes. See, e.g., *Personnel Administrator of Massachusetts v Feeney*, 442 U.S. 256, 271-272; 99 S. Ct. 2282; 60 L. Ed. 2d 870 (1979); *F S Royster Guano Co v Virginia*, 253 U.S. 412, 415; 40 S. Ct. 560; 64 L. Ed. 989 (1920). It may sometimes be difficult, at least outside the realm of "strict scrutiny" review, to define a law in terms of whether it is countenancing a constitutionally impermissible classification or merely classifying persons who are genuinely situated differently.

This is because, in one sense, an equal protection claim simultaneously asserts that two persons are similarly situated, but also that, at another level, such persons are not similarly *situated. The assertion that the two are similarly situated* forms the predicate for the argument that, notwithstanding such similarity, they are being treated in a differing manner in some regard. The assertion that the two are not similarly situated is a function of the fact that there is some unshared characteristic that allegedly forms the basis for the differing treatment. Consequently, because an equal protection claim sometimes implicates this tension between the assertions of similarity and dissimilarity, its success may sometimes rise or fall on the basis of a court's characterization of the classifications created by a particular statute.[6]

B. Specific problems in characterization

Not surprisingly, defendant characterizes this case as one in which different treatment has been properly afforded to children who were not, in fact, similarly situated. Rather, children whose paternity had been ascertained were treated differently than children whose paternity had not been ascertained. This is not an unreasonable characterization. The

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[6] In *Feeney*, supra, for example, the Supreme Court faced the difficulties in the characterization of a statute when female plaintiffs challenged a law granting veterans preferences with regard to state civil service hiring decisions. 442 U.S. at 259, 99 S. Ct. 2282, 60 L. Ed. 2d 870. Because the law operated overwhelmingly to the advantage of male applicants, the plaintiffs characterized the preference as impermissibly creating a classification on the basis of gender. However, the Court ultimately chose to characterize the preference as one creating a classification on the basis of one's status as a veteran. In other words, the Court determined that, even though significantly more men than women were being granted a benefit by the preference, the law was properly characterized as one granting veterans, regardless of gender, a benefit over nonveterans. Rather than distinguishing between persons on the basis of gender, the law distinguished between job applicants on the basis of nongender considerations.

only children affected by the statute were those: (1) whose putative father had not admitted paternity by signing an acknowledgment; (2) whose putative father had not been adjudicated the natural father through an order of filiation; and (3) whose mother had not been able to obtain, through stipulation, a modifiable support agreement.

The constitutional challenge here, from defendant's perspective, is not unlike that raised in *Frame v Nehls*, supra. In *Frame*, a grandfather sought visitation rights with his illegitimate grandchild. Under the relevant statute, grandparents only had standing to seek visitation during the pendency of a "child custody dispute." Because a paternity action was not within the statutory definition of a "child custody dispute," the grandfather lacked standing, and he challenged the statute on equal protection grounds, claiming that it unconstitutionally differentiated between legitimate and illegitimate children.

As in the instant case, the Court of Appeals in *Frame* agreed that the challenged statute created classifications on the basis of illegitimacy, and it found the statute an unconstitutional denial of equal protection. *Frame v Nehls*, 208 Mich. App. 412, 416; 528 N.W.2d 773 (1995). However, this Court disagreed, holding that the classification did not distinguish between children on the basis of illegitimacy. Rather, this Court pointed out that grandparents had standing to pursue visitation regardless of the child's legitimacy where, for example, the parents of a child born out of wedlock married, then later divorced. Consequently, this Court concluded that the statute did not create classifications on the basis of illegitimacy. 452 Mich. at 186-187, 550 N.W.2d 739.

Under this statute, there are a variety of situations under which illegitimate children receive the same right to fully modifiable support as children born during a marriage. First, where a putative father has signed an acknowledgment of paternity, any child support order entered regarding the child

is fully modifiable, because that child was, and is, accorded the "identical status, rights, and duties of a child born in lawful wedlock." MCL 722.1004; MSA 25.604. Second, where a putative father has been adjudicated the natural father by a circuit court, and an order of filiation has been entered, any child support order entered regarding that child was, and is, modifiable under MCL 722.720; MSA 25.500. Finally, where the parties to a paternity action have reached an agreement regarding child support, that agreement is modifiable as long as the support order includes language allowing modification. Consequently, it is not unreasonable to conclude that the statute has not created a classification on the basis of illegitimacy, but rather has created a classification on the basis of whether paternity had been legally determined. This is a classification that distinguishes between categories of illegitimate children, not between the categories of illegitimate and legitimate children. Under this interpretation, the statute should be upheld as long as it is rationally related to a permissible legislative objective.[7] See *Dandridge, supra* at 485; Manistee Bank & Trust v McGowan, 394 Mich. 655, 668; 232 N.W.2d 636 (1975).

The dissent concludes that "it is unreasonable to find that the statute did anything except distinguish the treatment of children on the basis of legitimacy." Slip op at 3 (KELLY, J., dissenting); see also slip op at 2 (WEAVER, C.J., dissenting). The dissenting justices reach this conclusion because, "illegitimate children, and they alone, received disparate treatment." Slip op at 3 (KELLY, J., dissenting); see also slip op at 2 (WEAVER, C.J., dissenting). However, the facts in the instant case are not unlike the facts in *Geduldig v Aiello*, for

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[7] A classification based on whether paternity has been determined neither implicates a fundamental right or an inherently suspect class, nor has it been recognized by this Court or the United States Supreme Court as deserving of any heightened standard of review. Moreover, the parties have provided no reason we should now create a new category of suspect class.

example, where women, and they alone, were denied certain disability insurance benefits because the policy excluded benefits for pregnancy. 417 U.S. 484; 94 S. Ct. 2485; 41 L. Ed. 2d 256 (1974).[8] In response to the argument that the challenged provision discriminated on the basis of gender because it only affected women--an argument analogous to the dissents' conclusion in the instant case--the Court stated:

> While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . The [insurance] program divides potential recipients into two groups--pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. [Id. at 496, n 20.]

Likewise, "while it is true" that only illegitimate children face the risk of being unable to determine paternity with legal certainty, "it does not follow that every legislative classification concerning" the determination of paternity is an illegitimacy-based classification. Rather, in each case, the fundamental classification may be more appropriately identified as distinguishing between subclassifications of the larger group--only women who are pregnant, and only illegitimate children who have not determined paternity.[9]

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[8] Superseded by statute as noted in *Newport News Shipbuilding & Dry Dock Co v EEOC*, 462 U.S. 669, 678; 103 S. Ct. 2622; 77 L. Ed. 2d 89 (1983).

[9] We emphasize again that we do not necessarily disagree with the dissents that the statute may also reasonably be characterized as one that creates classifications on the basis of illegitimacy. Rather, we merely

Plaintiff, like the dissents, and also not surprisingly, characterizes the challenged statute as one creating a statutory classification on the basis of illegitimacy. And although we could reasonably conclude that the statute merely differentiated on the basis of whether paternity had been ascertained, we also acknowledge that plaintiff's characterization of the statute is not unreasonable. First and foremost is our acknowledgment that the statute, where it applies, only affects illegitimate children. There is no apparent set of circumstances under which a legitimate child would be the object of an enforceable, nonmodifiable support agreement.[10] And while we do not find this dispositive regarding the "correct" characterization of the statute, see *Geduldig*, supra, it certainly provides support for a reasonable conclusion that the statute does create illegitimacy-based classifications.

We find it noteworthy that the Paternity Act itself, on its face, unquestionably differentiates between illegitimate and legitimate children. Indeed, it is an act created solely to apply to illegitimate children, to afford those children an opportunity to obtain child support that has always been available to legitimate children. Yet, surely plaintiff would not argue that the act itself is violative of equal protection merely because it recognizes the unique circumstances of the illegitimate child. But for this act, illegitimate children had no clearly enforceable means of obtaining support from their fathers. The individual provision in controversy is merely one specific element of the

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acknowledge that, just as it is not unreasonable to characterize a statute relating to pregnancy in more than one manner, it is not unreasonable to characterize the statute here in more than one manner. Because we find that the statute, as applied, was constitutional under either characterization, we need not decide which of these characterizations is more appropriate.

[10] The Paternity Act applies to children born during wedlock who are later deemed not to be the issue of the marriage. Thus, these children would be classified also as "illegitimate." MCL 722.713; MSA 25.493.

act, and that provision, like the overall act itself, advances the underlying goal of providing support to children who might otherwise be left without that support.

The United States Supreme Court has repeatedly examined laws differentiating on the basis of illegitimacy. For example, in *Mills* and *Clark*, supra, the Court examined Texas and Pennsylvania laws limiting the period during which illegitimate children could establish paternity. The Texas statute required that paternity actions be filed within one year after the illegitimate child's birth, and the Pennsylvania statute required that paternity actions be filed within six years after the illegitimate child's birth. As in the instant case, the challenged statutes affected only illegitimate children. However, also similar to the instant case, the challenged Texas and Pennsylvania statutes ultimately only affected a subclassification of illegitimate children--those who failed to establish paternity within the statutory period of limitations.[11]

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[11] Neither *Mills* nor *Clark* require us to reach the conclusion that the statute challenged here created classifications on the basis of illegitimacy; in neither of those cases did the Court address the threshold question whether the challenged statutes actually created classifications on the basis of legitimacy. The dissent states, "I conclude that the [Clark] Court did find that the statute created a classification on the basis of legitimacy." Slip op, p 5, n 4 (KELLY, J., dissenting). However, Justice Kelly reaches this conclusion, not because the Court expressly decided that the statute created classifications on the basis of illegitimacy, but rather because the Court examined the statute under intermediate scrutiny. We find the dissenter's analysis flawed. In both *Mills* and *Clark*, the Supreme Court was examining statutory periods of limitation applicable to all illegitimate children. Unlike the statute before us, the statutes challenged in *Mills* and *Clark* imposed a requirement on all illegitimate children--either ascertain paternity within the allotted time frame or be forever precluded from access to child support. So even though we conclude, for argument's sake, that the statutes in *Mills* and *Clark*, as applied, could be characterized as creating classifications either on the basis of illegitimacy or on the basis of whether paternity had been determined, there are significant differences between those cases and the instant case that could lead the same court to opposite results. Specifically, the statutes challenged in *Mills* and *Clark* created a

See also *Lalli v Lalli*, 439 U.S. 259; 99 S. Ct. 518; 58 L. Ed. 2d 503 (1978)(upholding a New York statute imposing a proof requirement on illegitimate children who would inherit from their fathers); *Trimble v Gordon*, 430 U.S. 762; 97 S. Ct. 1459; 52 L. Ed. 2d 31 (1977)(striking down as unconstitutional an Illinois statute allowing legitimate children to inherit from both parents but precluding illegitimate children from inheriting from their fathers).

V. Resolving the Present Case

A. Rational basis satisfied

The plaintiff does not claim that the statute in question is unconstitutional on its face. Consequently, the claim must fail unless the statute's application renders it unconstitutional. When faced with a claim that application of a statute renders it unconstitutional, the Court must analyze the statute "as applied" to the particular case. See, e.g., *People v Lino*, 447

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mandatory prerequisite to child support for all illegitimate children--prove paternity within the period of limitation. By contrast, the instant statute created options--prove paternity, obtain a nonmodifiable support agreement, or even obtain a modifiable support agreement. Consequently, even if we were to agree that the Supreme Court reached a decision that it did not expressly address, and even if we were to agree that such implicit decision making was binding on this Court, *Mills* and *Clark* do not require a conclusion that the challenged statute creates an illegitimacy-based classification; those cases are readily distinguishable from the instant case on their facts.

Even more importantly, the *Clark* Court was careful to point out that statutory classifications based on illegitimacy designed to punish the conduct of parents were different than statutory classifications based on illegitimacy designed to address paternity proof problems in the support context. *Clark*, *supra* at 461. The disputed statute here, to the extent that it treated illegitimate children differently than legitimate children, addressed the latter issue. That is, the challenged statute provided an alternative means of obtaining support for a child where paternity was uncertain.

Mich. 567, 570-571; 527 N.W.2d 434 (1994). Regardless of the level of scrutiny employed, an equal protection challenge requires us to make two findings: the governmental purpose behind the legislative enactment, and how closely related the law is to that purpose. If we view the challenged statute as one that merely differentiates on the basis of whether paternity has been established, we must then determine whether the statute is rationally related to a legitimate state interest. See *Dandridge*, supra at 485. The underlying purpose of the Paternity Act is to ensure that minor children born outside a marriage are provided with support and education. *Whybra v Gustafson*, 365 Mich. 396, 400; 112 N.W.2d 503 (1961). It is beyond dispute that this is a permissible government purpose. Thus, under rational-basis review, the statute should be upheld unless allowing nonmodifiable support agreements where paternity has not been ascertained is "arbitrary and wholly unrelated in a rational way to the objective of" securing support for children. *Smith v Employment Security Comm*, *supra* at 271.

In the context of a law created to secure child support from fathers, there is a core distinction between knowing who the child's father is and not knowing who the child's father is. Absent the disputed law, children whose paternity could not be determined had no means of obtaining support from their fathers. MCL 722.713; MSA 25.493 directly addressed the proof problem present in child support cases involving illegitimate children by providing an additional method by which illegitimate children could obtain financial support, again, a permissible, and even compelling government interest. See *Clark*, *supra* at 461.

As a result of DNA testing, the accuracy with which paternity can be proven has increased significantly since the parties in this lawsuit entered into their support agreement. See Shapiro, Reifler, & Psome, *The DNA paternity test: Legislating the future paternity action*, 7 J Law & Health 1, 29 (1992-93) (current testing methods can determine the probability of

paternity to 99.999999% accuracy). However, at the time the parties before us entered into the disputed agreement, proving paternity was a very significant obstacle to an illegitimate child's access to child support. The first reported results of modern DNA paternity testing did not occur until 1985. See Blakesley, *Scientific testing and proof of paternity: Some controversy and key issues for family law counsel*, 57 La L R 379, 382 (1997) ("In fact, since its first reported results in 1985, DNA matching has progressed to 'general acceptance in less than a decade'"). Of course, while prior blood-testing methods could exclude some males from being the possible father of a child, those methods could not affirmatively pinpoint a particular male as being the father. Thus, when the settlement agreement between the present parties was entered in 1980, establishing paternity was a far more difficult ordeal than at present. Contested paternity actions at that time were often no more than credibility contests. See Illinois Family Study Commission, Report and Recommendations to the 76th General Assembly (1969), at 55 (finding that paternity actions at the time were often rife with coercion, corruption and perjury). Consequently, in every contested paternity action, obtaining child support depended not merely on whether the putative father was, in fact, the child's biological father, but rather on whether the mother could prove to a court of law that she was only sexually involved with one man--the putative father. Allowing parties the option of entering into private agreements in lieu of proving paternity eliminated the risk that the mother would be unable meet her burden of proof. The procedure established by the Paternity Act provided a voluntary and additional alternative to the often uncertain paternity suit process by which a mother could obtain support for her illegitimate child.

In light of the pre-DNA proof problems associated with proving paternity, the availability of nonmodifiable child support specified by the Paternity Act promotes the principal purpose of the act, i.e., to ensure that minor children born outside a marriage are provided with support and education.

Whybra , supra. The statute in question takes cognizance of perhaps the central distinction between illegitimate and legitimate children--the formers' reduced lack of certainty regarding their paternity. By recognizing this reality, and seeking to ameliorate its consequences, the statute, as applied, is rationally related to the state's interest in ensuring that illegitimate children are provided support. For these reasons, we conclude that the disputed statute satisfies a rational-basis standard of review.[12]

B. Heightened scrutiny satisfied

In *Gomez, supra* at 538, the United States Supreme Court acknowledged that treating illegitimate children differently might be appropriate under some circumstances, due to the "lurking problems with respect to proof of paternity." See also *Clark, supra* at 461. The very existence of an "intermediate" level of review, i.e., a standard of review more respectful of legislative distinctions than with regard to the most highly suspect categories of race, nationality, and ethnicity, represents an implicit acknowledgment that there are some immutable distinctions between various classes of

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[12] Even recognizing that DNA testing can conclusively establish paternity, and that the unreliability of testing is no longer the obstacle that it once was in paternity suits, this does not altogether eliminate "proof" problems in the context of paternity suits. Proving paternity involves not only the technical and scientific elements of establishing a genetic relationship, but also a variety of other legal and practical burdens, including the necessity of identifying and locating the putative father, the need to obtain and enforce court orders requiring paternity testing, the emotional and psychological burdens associated with trial, the inevitable uncertainties of the legal process, and, while perhaps increasingly remote, problems associated with obtaining reliable test results. Each of these steps to proving paternity can involve significant resources, in terms of time, effort, and money. Moreover, there may conceivably be circumstances in which ascertaining paternity through the legal process may not always be in the child's own best interest, even where such paternity could be proven conclusively from a scientific standpoint.

persons, and that it is sometimes within the Legislature's prerogative to address those distinctions, even where the result is dissimilarity of treatment. For example, legislation addressing some aspect of pregnancy and childbirth does not violate equal protection merely because it differentiates on the basis of gender. *Geduldig*, 417 U.S. at 496, n 20. Rather, such legislation would be in direct response to an immutable difference between men and women--the biological ability to bear children. See also *Rostker v Goldberg*, 453 U.S. 57; 101 S. Ct. 2646; 69 L. Ed. 2d 478 (1981)(holding that women were not similarly situated to men for purposes of a draft or registration for a draft).

Providing financial support for children is a permissible, important, and even compelling governmental interest. A core distinction between legitimate and illegitimate children is the difficulty of determining paternity of the latter with the same level of certainty that paternity can be ascertained with respect to the former. And where paternity is uncertain--again, one of the immutable distinctions between legitimate and illegitimate children--providing an alternative means of obtaining child support to mothers who may not otherwise be able to prove paternity is substantially related to the goal of providing children with support. This is particularly true with respect to the instant case, where the parties entered into their agreement at a time in which plaintiff faced significant obstacles to overcoming defendant's claim that he was not the child's father. The lack of modern DNA testing when these parties entered their settlement underscores that the statute, as applied in this case, did not violate the constitutional guarantees of equal protection. See, e.g., *Lino*, 447 Mich. at 570-571. The possibility of nonmodifiable child support held out by MCL 722.713; MSA 25.493 provided an incentive for a putative father of an illegitimate child not to dispute paternity. This furthered the important governmental objective of ensuring financial support for children who otherwise may

have gone without any form of "paternal" child support.[13]

The dissents rely on *Gerhardt v Estate of Moore*, 150 Wis. 2d 563; 441 N.W.2d 734 (1989), as support for the conclusion that the disputed statute was unconstitutional under intermediate scrutiny. Slip op at 8 (Kelly, J., dissenting); slip op at 3 (Weaver, C.J., dissenting). However, as the dissent in Gerhardt notes, there is an important distinction between the facts in *Clark, supra*, and the facts in *Gerhardt*:

> Where the statute of limitations in *Clark*, according to the Supreme Court, might prevent a mother from bringing a support claim on behalf of the nonmarital child because she might not act to protect the child's interest in a timely manner, the settlement provision of the Wisconsin Statutes at issue in this case encourages her to do so. [Id. at 578 (Callow, J., dissenting).]

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[13] Justice Kelly compares the instant case to *Evink v Evink*, 214 Mich. App. 172; 542 N.W.2d 328 (1995), a case in which the Court of Appeals obviated a father's attempt to avoid his child-support obligations through voluntary termination of his parental rights. However, this case illustrates precisely why it may be appropriate in some cases to treat legitimate and illegitimate children differently. A child's absolute right to receive child support from a father only has value where paternity can, in fact, be ascertained. A child does not have an absolute right to receive child support from a putative father. The case before us is not a case in which a known parent has been allowed to "voluntarily release parental rights in order to escape the child support obligation . . . ." Id. at 176. Rather, this is a case in which a child of uncertain paternity was provided with a means of obtaining child support from a person who, because of evidentiary limitations, might otherwise have avoided any obligation to pay child support. An analogy between *Evink* and the instant case fails for the same reason that the challenged statute is constitutional--unavoidably there are immutable differences between legitimate and illegitimate children. Ascertaining paternity with certainty is such a difference.

Likewise, MCL 722.713; MSA 25.493 did not operate to "prevent a mother from bringing a support claim on behalf of [her] nonmarital child." Rather, it operated as an incentive to those mothers who might have otherwise been reluctant or unable to invoke the paternity process in the face of highly uncertain prospects. Thus, the Wisconsin statute, and the statute before us, operated, not as a burden, as suggested by Justice Kelly, slip op at 6, n 5 (Kelly, J., dissenting), but as a benefit.

Even presuming, however, that *Gerhardt* was correctly decided, that case is clearly distinguishable on its facts. First, the statute challenged in Wisconsin allowed nonmodifiable settlement agreements in all paternity actions, regardless of whether paternity had been admitted or ascertained by the court.[14] Contrary to Justice Kelly's conclusion, this is a distinction with a crucial difference. See Slip op at 11, n 10 (Kelly, J., dissenting). MCL 722.713; MSA 25.493, allows nonmodifiable support agreements only where paternity has not been ascertained, a distinction illustrating the clear relationship between the Michigan statute and paternity proof problems. Second, the defendant in *Gerhardt* acknowledged paternity. *Id.* at 566. It is true, as Justice Kelly observes, that the Wisconsin Supreme Court did not consider the defendant's

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[14] "If the defendant is found the father of the child, or admits the truth of the allegation, or enters into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity is denied in such settlement agreement, ..." *Madison General Hosp v Haack*, 124 Wis. 2d 398, 410, n 7; 369 N.W.2d 663 (1985), quoting St 1975, § 52.37(1). See also *Larson v Wisconsin Dep't of Industry, Labor & Human Relations*, 76 Wis. 2d 595, 618-619; 252 N.W.2d 33 (1977).

St 1967, § 52.38 provided for modification of settlement agreements entered pursuant to St 1975, § 52.37 only if the father (or putative father) failed to comply with the terms of the settlement, or where the settlement agreement "providing for the monthly support of a child born out of wedlock has been docketed or filed . . ." Gerhardt, supra at 573, quoting St 1967, § 52.38.

admission of paternity in reaching its decision. Slip op at 12, n 10 (Kelly, J., dissenting). We point out however, that in Michigan, once a putative father has acknowledged paternity, his child is entitled to fully modifiable support, just as any other child whose paternity has been ascertained. MCL 722.1004; MSA 25.604. It is only where paternity is uncertain that nonmodifiable child support is allowed.[15] Thus, if we were faced with the same facts as those before the Wisconsin

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[15] Justice Kelly also cites *Dep't of Public Aid ex rel Cox v Miller*, 146 Ill. 2d 399; 586 N.E.2d 1251, 166 Ill. Dec. 922 (1992), and suggests that the Illinois Supreme Court, in order to "salvage" an otherwise unconstitutional statute similar to the challenged statute here, interpreted a provision allowing illegitimate children the continuing right to file an action to ascertain paternity as also allowing those children to seek modification of nonmodifiable support agreements. Slip op at 10, n 8 (Kelly, J., dissenting). Regardless of the Illinois Supreme Court's dicta regarding what it would or would not find constitutional under facts not before it, the challenged statutory scheme in that case allowed an illegitimate child to file a paternity action at any time. The Illinois court relied on the express language of the state's Paternity Act to conclude that whenever paternity was ascertained, the child was entitled to the same right to modifiable child support as legitimate children. *Miller, supra* at 411, quoting Ill Rev Stat 1983, ch 40, par 1352, "The father of a child born out of wedlock whose paternity is established in a proceeding under this Act shall be liable for its support . . . to the same extent and in the same manner as the father of the child born in lawful wedlock . . . ." Although the court expressed its opinion with respect to the constitutionality of a hypothetical statute that precluded modification, there is no indication in its opinion that it relied on anything but the plain language of the statutory scheme and legislative intent to determine that the statute allowed complete modification any time that paternity was ascertained and that a nonmodifiable settlement agreement did not bar a suit to ascertain paternity. *Id.* at 412 ("To find otherwise would be to denigrate the clearly expressed intent of the legislature as well as the public policy of the State"). The mere fact that an appellate court had interpreted the statute differently does not mean that "the statute did not allow modification of child support agreements until the court interpreted it to do so." Slip op at 10, n 8 (Kelly, J., dissenting). Rather, the Illinois court found that the Paternity Act, as written and as the legislature had intended, allowed modification of child support any time that paternity could be determined. Consequently, that court's determination of the constitutionality of a dissimilar statutory scheme is of little value.

Supreme Court, we cannot say whether we would reach a different conclusion. Clearly, under Michigan law, a defendant similarly situated to the defendant in *Gerhardt*, that is, one who has made a legal acknowledgment of paternity, would be required to provide fully modifiable child support, and the case would not be before us--a distinction with a clear difference.

It is true that, in this case, MCL 722.713; MSA 25.493 was given continued application even after the advent of modern DNA testing.[16] However, at least in the context of a case in which the settlement agreement pertaining to support for an illegitimate child was entered before the advent of modern DNA testing, important governmental interests are clearly served by continuing to give force to the agreement even after the advent of such testing. The most obvious interest is allowing parties to an agreement to order their conduct in reliance upon such agreements, and maintaining the integrity of such agreements. In this and in countless similar cases, parties entered into nonmodifiable settlement agreements that were expressly approved by a circuit court judge. The putative fathers in such cases were, in effect, promised by a trial court judge that the level of child support imposed upon them would not be increased above the amount provided for in the settlement agreement. To allow these understandings to be altered years later, even on the basis of technological advances, could only be expected to undermine confidence in the legitimacy and fairness of a legal system that promised these individuals one thing, but then later changed the rules of the game. Moreover, if we were to allow these promises to be avoided where technological advances could be utilized to prove paternity, we would also, in fairness, need to allow such promises to be avoided where technological advances could be utilized to disprove paternity.

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[16] For purposes of the instant case, we need not decide whether MCL 722.713; MSA 25.493, had it not been repealed, would remain constitutional today under intermediate scrutiny.

It is critical to recognize that this is not a statute designed to impose burdens upon illegitimate children for the behavior of their parents, or even to discourage sexual relations outside the institution of marriage or otherwise influence societal norms. Rather, it is designed to address paternity proof problems in the support context--an important governmental interest, repeatedly sanctioned by the United States Supreme Court--in order to afford the mother of an illegitimate child the opportunity to bind the child's putative father to a support order, without a final determination of paternity, and thereby to afford enhanced opportunities for the support of illegitimate children. We do not conclude, as Justice Kelly contends, that these benefits "[outweigh] the substantial interest our state has in ensuring that our youngsters receive adequate support throughout childhood." Slip op at 12, n 10. Rather, we conclude that these benefits themselves directly address "the interest our state has in ensuring that our youngsters receive adequate support throughout childhood." They do so by providing additional opportunities to obtain that support to children who might otherwise be denied any support whatsoever.

Nor can we altogether ignore the fact that the instant statute does not compel mothers to agree to nonmodifiable support. Rather than denying illegitimate children the right of support from their fathers, the statute provides illegitimate children, through their mothers, a voluntary and additional optional mechanism for obtaining support--a compromise in exchange for the significant risk that the mother would lose the case and the child would receive no support whatsoever. Nonmodifiable support agreements, along with modifiable support agreements, are available, not required, under the statute, and are only enforceable where the court has otherwise determined that the agreements provide sufficient support for the child. Again, this is not a case in which the state "posited a judicially enforceable right of children to support from their natural fathers," but denied that same right to illegitimate children. *Mills, supra* at 92, citing *Gomez*, supra.

The dissenting opinions conclude that the statute, rather than providing an additional opportunity for illegitimate children to obtain support, actually operates to their detriment because it precludes modification of child support. However, this conclusion not only fails to take into consideration the practical problems confronting the mother of the illegitimate child in proving paternity before the advent of DNA testing, but also fails to consider that modification of child support is based on more than merely the child's needs. In determining whether modification is warranted, the courts are required to take into consideration, not only the child's needs, but also the father's financial circumstances. Although recipients of nonmodifiable support may be precluded from obtaining an increase in support, they are also precluded from suffering a reduction in support. Even more consequentially, of course, absent the statute, the recipients of nonmodifiable support are "precluded" from being denied support altogether, such as where the mother was unable to overcome problems in proving paternity that existed before DNA testing. Moreover, putative fathers who agreed to nonmodifiable support are precluded from taking advantage of advances in technology to disprove paternity, just as the mothers are to prove paternity.[17] Finally,

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[17] Justice Kelly finds this statement unpersuasive because of the judiciary's underlying goal of "ascertaining the truth." While this is true, the Legislature, in its enactment of the law, also has other objectives, in particular ensuring that illegitimate children are supported. At the time the instant agreement was entered into, the judicial system was less able to ascertain the truth concerning matters of paternity than it might be today. The mothers who entered into the agreements provided for by MCL 722.713; MSA 25.493 accepted nonmodifiable support to avoid the risk of receiving no child support whatsoever, in the event of their inability to convince the court that the putative father was, in fact, the biological father. Moreover, they avoided the risk of receiving a reduction in child support in the event that the child's needs and the parties' financial situation warranted such reduction, and they also avoided the risk that the putative father could, with advances in technology, eliminate child support altogether. Similarly, the putative fathers agreed to nonmodifiable support to avoid the risk of the court determining--perhaps incorrectly, and certainly not with scientific

we emphasize again that nonmodifiable support agreements are only enforceable when a court has determined that they satisfactorily provide for the child. While the courts certainly cannot anticipate every need and every change in the child's circumstances, these agreements have presumably been analyzed in the light of their ability to adequately provide for the child throughout childhood.

Because the statute is substantially and directly related to the general goal of obtaining child support for illegitimate children, and because it is substantially and directly related to the state's legitimate concern regarding proof problems in the child support context, we find that it is not an unconstitutional denial of equal protection under the law, regardless of whether the rational basis or intermediate standards of review are employed.

VI. Conclusion

There are alternative ways of characterizing the classifications created by the instant statutory provision. One reasonable characterization is that this statute distinguishes between children whose paternity has not been ascertained and children whose paternity has been ascertained. Alternatively, the classifications created by the challenged statute could reasonably be characterized as being based on illegitimacy because the statute only affects children born out of wedlock.

Viewing the challenged statute as one which merely

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certainty--that they were the biological fathers. The goal of ascertaining the truth is not compromised when parties, recognizing the strengths and weaknesses of the proofs available in their situation, agree to make concessions so that each might avoid unnecessary risks. Here, the Legislature has allowed, and the parties have agreed, that a given child should receive child support from the putative father even without judicial ascertainment of the truth particularly where, as here, the judiciary lacked the means by which to ascertain this with any genuine degree of certainty.

differentiates on the basis of whether paternity has been ascertained, we find that the statute is rationally related to the legitimate state interest of ensuring that minor children born out of wedlock are provided with support and education. Moreover, viewing the challenged statute as one that distinguishes children on the basis of illegitimacy, we find that the statute's purpose of providing support for illegitimate children is an important, and even compelling, state interest and that the challenged statute, as applied, substantially and directly advances this important interest by providing an avenue to avoid problems associated with proving paternity, yet still provide support for the child.

Therefore, we find that, regardless of this Court's characterization of the classifications created by the challenged statute, the statute does not violate the constitutional guarantees of equal protection of the law. We reverse the judgement of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Clifford W. Taylor
/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan

KELLY, J. (dissenting).

The Paternity Act, before being amended, impermissibly discriminated against illegitimate children by denying them the opportunity accorded legitimate children for modification of agreements providing for their support.[1] "[A] State may not

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[1] MCL 722.713; MSA 25.493 was part of the Paternity Act, MCL 722.11 et seq.; MSA 25.491 et seq. It was repealed by the Legislature, effective June 1, 1997, after the Court of Appeals declared it unconstitutional in *Dones v Thomas*, 210 Mich. App. 674; 534 N.W.2d

invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v Perez*, 409 U.S. 535, 538; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973). Therefore, I would affirm the Court of Appeals decision and remand the case for further consideration of the parties' arguments pertaining to retroactivity.[2]

Section 3 of the statute at issue provided:

> a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
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> b) The performance of the agreement or compromise, when so approved, *shall bar other remedies of the mother or child for the support and education of the child.* [Emphasis added.]

A

Plaintiff brought an equal protection challenge to § 3.

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221 (1995). See 1996 PA 308.

[2] I do not treat the arguments concerning retroactivity, because that issue was not considered by the Court of Appeals majority in this case. 232 Mich. App. 284, 297, 591 N.W.2d 277 (1998)(Fitzgerald, J., concurring)(*Crego III*).

As the majority has indicated, any one of three different standards of review applies to equal protection challenges, depending on the nature of the alleged classification. Slip op, pp 9-10.

I disagree with the majority's holding that it is equally reasonable to apply the rational basis standard of review to § 3 as to apply an intermediate or heightened scrutiny standard. Slip op, p 16. Intermediate or heightened scrutiny applies to claims of disparate treatment based on the legitimacy or illegitimacy of a person. *Mills v Habluetzel*, 456 U.S. 91; 102 S. Ct. 1549; 71 L. Ed. 2d 770 (1982); *Pickett v Brown*, 462 U.S. 1; 103 S. Ct. 2199; 76 L. Ed. 2d 372 (1983).

The majority states that one could reasonably characterize § 3 as treating children differently on the basis of whether paternity has been established. Slip op, p 18. That view focuses on the fact that illegitimate children whose paternity has been established are not affected by the statute. Then, it supports a rational basis standard of review, because a classification based on paternity invokes neither intermediate nor strict scrutiny. See *Plyler v Doe*, 457 U.S. 202, 216-217; 102 S. Ct. 2382; 72 L. Ed. 2d 786 (1982)(identifying situations in which strict scrutiny applies); *Mills, supra* (identifying situations in which intermediate scrutiny applies).

The majority's view is flawed. It is unreasonable to find that the statute did anything except distinguish the treatment of children on the basis of legitimacy. Although not all illegitimate children received disparate treatment under § 3, the dominant reality is that illegitimate children, and they alone, received disparate treatment. The majority acknowledges that "there is no apparent set of circumstances under which a legitimate child would be the object of an enforceable, nonmodifiable support agreement." Slip op, p 18.[3]

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[3] The Paternity Act's description stated that its provisions only apply to illegitimate children: "An act to confer upon circuit courts

The United States Supreme Court has held intermediate or heightened scrutiny to apply under similar circumstances. *Clark v Jeter*, 486 U.S. 456; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988); see also *Williams v Lambert*, 902 F. Supp. 460 (SD NY, 1995); *Gerhardt v Estate of Moore*, 150 Wis. 2d 563; 441 N.W.2d 734 (1989). In *Clark*, the Court considered a Pennsylvania statute that required illegitimate children to prove paternity before seeking support from their fathers. It required that a suit to establish paternity be brought within six years of the children's birth. *Clark, supra* at 457.

In contrast, legitimate children could seek support from their parents at any time. *Id.* The statute did not affect all illegitimate children by blocking their attempts to obtain support from their fathers. It affected only those illegitimate children who had not established paternity within six years of birth.

Thus, as here, children could have been identified as those whose paternity had been determined and those whose paternity had not. However, the Court was not concerned about that fact, instead it applied intermediate scrutiny to a review of the statute. It stated:

> "First, the period for obtaining support . . . must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be *substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims*." [*Clark, supra* at 462, quoting *Mills*, 456 U.S. at 99-100 (emphasis added).]

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jurisdiction over proceedings to compel and provide support of children born out of wedlock . . . ." 1956 PA 205 preamble.

The Court held that the statute was unconstitutional on the basis that it was not substantially related to an important state interest. 486 U.S. at 464.[4]

I reach the same conclusion as did the United States Supreme Court in *Clark*. Even though § 3 did not include every illegitimate child, intermediate scrutiny must apply where the statute affected any child's right to receive parental support on the basis of illegitimacy. Accordingly, intermediate or heightened scrutiny should be the only standard used in considering the constitutionality of § 3. *Clark, supra* at 461.[5]

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[4] The majority states that, in *Clark*, the Court never determined whether the challenged statute actually created a classification on the basis of illegitimacy. Slip op, p 20 n 11. It fails to recognize that there was no other issue in *Clark* that would have compelled the Court to apply the intermediate scrutiny standard of review. Thus, I conclude that the Court did find that the statute created a classification on the basis of illegitimacy.

[5] The majority quotes from *Geduldig v Aiello*, 417 U.S. 484; 94 S. Ct. 2485; 41 L. Ed. 2d 256 (1974), to support its position. Slip op, p 17. However, cases that have followed *Geduldig* indicate that it is not applicable here. See *Eberts v Westinghouse Electric Corp*, 581 F.2d 357, 360, n 1 (CA 3, 1978)("[*Geduldig*] is an insurance case and simply allows the exclusion of pregnancy-related disabilities from an employer's disability benefits plan"). The Sixth Circuit wrote the following regarding the footnote now cited by the majority: "It is apparent from our reading of footnote 20 that the Court's observations are made in the particular and narrow confines of the state's power to draw flexible and pragmatic lines in the social welfare area." *Satty v Nashville Gas Co*, 522 F.2d 850, 853 (CA 6, 1975).

The United States Supreme Court, in affirming the Sixth Circuit decision in *Satty*, made the distinction between *Geduldig* and this case even more clear:

> Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than

B

In order to survive intermediate scrutiny, a statute that results in the treatment complained of must be "substantially related to an important governmental objective." *Clark, supra* at 461. The majority attempts to show that, even when intermediate scrutiny is applied, § 3 passes constitutional muster. Slip op, p 36. It relates the important government objective of § 3

> to address paternity proof problems in the support context . . . in order to afford the mother of an illegitimate child the opportunity to bind the child's putative father to a support order, without a final determination of paternity, and thereby to afford enhanced opportunities for the support of illegitimate children. [Slip op, p 33.]

I recognize the importance of the state's interest in enhancing the opportunity for illegitimate children to obtain

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one of semantics. We held in [*General Electric Co v Gilbert*, 429 U.S. 125; 97 S. Ct. 401; 50 L. Ed. 2d 343 (1976)(based on *Geduldig*)], that [the statute] did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the 'scheme of human existence,'" 429 U.S. at 139, n.17, 97 S. Ct. 401, 50 L. Ed. 2d 343. But that holding does not allow us to read [the statute] to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role. [*Nashville Gas Co v Satty*, 434 U.S. 136, 142; 98 S. Ct. 347; 54 L. Ed. 2d 356 (1977).]

Similarly, here, § 3 is not a statute that results in an underinclusive offering of insurance or social program benefits. Rather, § 3 imposes a burden on illegitimate children and their mothers by foreclosing any opportunity to modify child support agreements. See *Gerhardt*, supra at 572.

support from their fathers. However, I disagree with the majority that § 3 is substantially related to that purpose.

While the Supreme Court in *Clark* did not rest its decision on such grounds, it recognized that the need for child support changes over time.

> A mother might realize only belatedly "a loss of income attributable to the need to care for the child," *Pickett, supra*, [p 12]. Furthermore, financial difficulties are likely to increase as the child matures and incurs expenses for clothing, school, and medical care. . . . Thus it is questionable whether a State acts reasonably when it requires most paternity and support actions to be brought within six years of an illegitimate child's birth. [*Clark* , 486 U.S. at 463-464.]

How much more unreasonable is it for a state to preclude any modifications to support agreements entered into shortly after a child's birth in light of those same factors? The Wisconsin Supreme Court answered that question when it decided the case of *Gerhardt, supra,* on remand from the United States Supreme Court for reconsideration in light of *Clark*.[6]

In *Gerhardt*, the Wisconsin Supreme Court considered a statutory provision that authorized lump-sum payments to encourage the settlement of paternity cases. The provision forbade the revision or alteration of such settlements, unless the father failed to comply with their terms. *Gerhardt*, 150 Wis.

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[6] The remand order appears at: *Gerhardt v Estate of Moore*, 486 U.S. 1050; 108 S. Ct. 2814; 100 L. Ed. 2d 915 (1988).

2d at 571.[7] The court concluded:

> Because marital children are not precluded from seeking additional child support notwithstanding a prior court order setting the amount of support, we conclude that prohibiting nonmarital children involved in lump-sum settlement agreements from seeking additional support amounts to a denial of equal protection. [150 Wis. 2d at 565.]

In *Gerhardt*, the defendant argued, as the majority concludes here, that the statutory provision gives illegitimate children an additional option in the form of a lump-sum settlement provision. 150 Wis. 2d at 571; slip op, p 33. The *Gerhardt* court, however, recognized the error in that argument.

> [I]t is an option that has in reality worked to the detriment of many nonmarital children. It is, at best, an illusory benefit amounting to no benefit at all. It is, in reality, an additional burden. Similar to the procedural bars invalidated in the *Clark* line of cases, the lump-sum settlement provision deprives certain nonmarital children the opportunity to obtain adequate support. Although *Clark* and the cases cited therein deal with statutory limitation bars to the filing of actions, the bar to seeking additional child support that results from a lump-sum agreement works in precisely the same manner. Regardless of the label attached

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[7] The Court stated the issue as follows: "Whether a statutory provision denying nonmarital children involved in lump sum child support settlements the ability to seek additional support from the father, a right not denied marital children, amounts to a denial of the equal protection of the law." 441 N.W.2d at 735.

> to the statutory bar, the result is the same. The nonmarital child, unlike the marital child, is barred from seeking additional support, regardless of need. That is hardly fair to the nonmarital child, much less constitutional. *That is what the United States Supreme Court recognized in remanding this action, and that is what we recognize today.* [150 Wis. 2d at 571-572 (emphasis added).][8]

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[8] The Wisconsin Supreme Court is not alone in its conclusion. A New York federal district court believed that a New York appellate court would strike down a substantially similar New York statute on the basis of Clark or construe the statute so that it would permit an illegitimate child to seek modification of a support agreement. Williams, supra at 463, n 5.

The Illinois Supreme Court, on the basis of *Clark* and *Gerhardt*, took the second approach. In *Dep't of Public Aid ex rel Cox v Miller*, 146 Ill. 2d 399, 408-410; 586 N.E.2d 1251, 166 Ill. Dec. 922 (1992), that court considered "whether a settlement order and dismissal entered in a paternity action bar a subsequent action brought by or on behalf of the illegitimate minor for support." *Id.* at 403. The court identified that previous appellate court decisions held that the Illinois Paternity Act did not "'permit the mother, alleged father, or a public agency which has supported the child to bring an action after a court-approved settlement has been reached.'" *Id.* at 402 (citation omitted). The court agreed with the analysis of *Gerhardt*. It held that equal protection of the law would be violated if illegitimate children were unable to seek modification of child support agreements when legitimate children had that opportunity. Id. at 411. To salvage the statutory scheme, the court read the act to allow illegitimate children to bring an action to modify child support agreements. Contrary to the majority's assertion, the "plain language of the statutory scheme" allowed a child to bring an action at any time only to ascertain paternity. *Id.* It said nothing of a child's right to modify otherwise nonmodifiable support agreements. *Id.*

The majority attempts to discredit my citation to Cox by identifying it as dicta and trying to distinguish the instant case from it. See slip op, p 30, n 15. In Cox, the statute did not allow modification of child support agreements until the court interpreted it to do so. That was in the face of a constitutional challenge on the basis of Clark and Gerhardt. Thus, the case is similar to the instant case, and its discussion

I agree with the Wisconsin Supreme Court that statutes such as § 3 violate an illegitimate child's right to equal protection of the law. Similar to the Wisconsin statute, § 3 actually limited the opportunities for illegitimate children to receive support from their putative fathers. It did so by foreclosing any opportunity for support orders to be modified beyond what was agreed to under conditions very likely unfavorable to both mother and child.[9] It is unreasonable to believe that an agreement entered into at the onset of a child's life can accurately anticipate and provide for all the contingencies that child will face until reaching adulthood. Thus, I conclude that § 3 worked against and failed to be substantially related to the state's interest in procuring adequate

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of Clark and Gerhardt were essential to its resolution.

[9] The United States Supreme Court identified the difficult situation that a mother faces when deciding whether to file a paternity suit.

> "It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by child-birth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit . . . ." [*Mills, supra* at 103.]

Those factors are present when an unwed mother must decide, shortly after her child's birth, whether to accept a settlement from the putative father. How could she be certain of the support needs of her and her child for the next eighteen years? See *Cox*, n 8 *supra* at 407. It is readily apparent that, under such circumstances, a mother and child may not receive the "enhanced opportunities" that the majority asserts § 3 provides to them. See slip op, p 33.

child support for illegitimate children.[10]

In a somewhat analogous situation, our Court of Appeals declared that a noncustodial father could not avoid his obligation to support his child by voluntarily terminating his parental rights. *Evink v Evink*, 214 Mich. App. 172; 542 N.W.2d 328 (1995). It recognized that "[a] child has an inherent right to parental support" and "parents may not

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[10] The majority fails to give appropriate weight to the fact that settlement agreements result in a burden on the mother and the child when they provide inadequate child support. See slip op, p 29.

In addition, the majority attempts to draw a distinction between this case and *Gerhardt* because the statute in *Gerhardt* allowed nonmodifiable child support agreements in all paternity actions. Also, in *Gerhardt*, there was an admission of paternity. *Id.* Each is a distinction without a difference. The fact that the statute in *Gerhardt* applied to all paternity actions does not diminish the fact that both it and § 3 had disparate effects on illegitimate children. There is, as the majority asserts, a clear relationship in Michigan between our statute and paternity proof problems. However, it is also true that § 3 discriminates against illegitimate children in the same manner as the statute at issue in *Gerhardt*.

Neither is it of any significance that there was an admission of paternity in *Gerhardt*. That fact was irrelevant to the court's determination that the statute was not substantially related to an important government objective. *Gerhardt*, 150 Wis. 2d at 574; see also *Cox*, supra at 408. One would expect that, had paternity not been admitted or established in *Gerhardt*, as it has not been here, the *Gerhardt* court would have reached the same conclusion.

In an effort to justify the statute, the majority reaches to find a benefit in the fact that "putative fathers who agreed to nonmodifiable support are precluded from taking advantage of advances in technology to disprove paternity, just as mothers are to prove paternity." Slip op, p 35. I fail to see how that is a benefit, because one of our major goals is to ascertain the truth. The State clearly does not have a substantial state interest in furthering falsehood and avoiding the truth. Although the majority names additional benefits that the statute provides, none of them outweighs the substantial interest our State has in ensuring that our youngsters receive adequate support throughout childhood.

bargain away a child's right to receive adequate support." 214 Mich. App. at 175-176 (citations omitted):

> To accept defendant's position would be to allow a parent to voluntarily release parental rights in order to escape the child support obligation where the child remains in the custody of the other biological parent. Such a result is not supported by statute, case law, or sound public policy. [*Id.* at 176.]

CONCLUSION

In this case, § 3 of the Paternity Act presented a father with the same opportunity, that of evading his child support obligation, as was rejected by the Court of Appeals in *Evink*. The act allowed a father to voluntarily enter into a child support agreement that the mother could not modify, even if the child's needs increased. The act allowed a father to escape his responsibility to provide for his child, and the child was deprived of that to which it was entitled.[11] No similar "loophole" exists in the law for the benefit of fathers of legitimate children.

Accordingly, I conclude that § 3 violated the right of illegitimate children to equal protection under the law. In so doing, I align myself with the position of three different panels

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[11] Contrary to the assertion by the majority, *Evink* illustrates precisely why we should not allow illegitimate children to be burdened by nonmodifiable child support agreements. See slip op, p 27, n 13. The majority fails to acknowledge that a putative father may very well know that he is the father of a child. However, he may be able to profit from the difficult situation the mother faces to procure a settlement he finds favorable. The majority identifies the statute as providing an illegitimate child with an opportunity to obtain child support from someone who might not otherwise provide it. However, it also allows someone who might otherwise have been responsible for adequate child support to avoid that obligation.

of the Court of Appeals,[12] the Illinois Supreme Court,[13] and the Wisconsin Supreme Court.[14] The majority decides to proceed down a different path. I would affirm the judgment of the Court of Appeals and remand for further consideration of the parties' arguments concerning retroactivity. I cannot follow the majority down a path that leads to a position contrary to the constitution.

/s/ Marilyn J. Kelly
/s/ Michael F. Cavanaugh

WEAVER, C.J. (dissenting).

I respectfully dissent from the majority's conclusion that MCL 722.713; MSA 25.493 did not violate equal protection. I believe that the statute creates a classification based on illegitimacy and that the statute cannot withstand the heightened scrutiny applied to such a classification. Therefore, I would affirm the Court of Appeals.

Because there are situations in which illegitimate children receive a right to modifiable support, the majority opines that this statute does not create a classification based on illegitimacy, but one based on whether "paternity has been legally determined." Slip op at 16. I disagree.

Children have a right to support from their biological parents. See *Evink v Evink*, 214 Mich. App. 172, 175-176; 542 N.W.2d 328 (1995). As the majority acknowledges, MCL

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[12] See *Dones*, n 1 *supra*; *Crego v Coleman*, 226 Mich. App. 815, 573 N.W.2d 568 (1997)(*Crego II*); *Crego v Coleman*, n 2 supra (*Crego III*).

[13] *Cox*, n 8 *supra*.

[14] See *Gerhardt, supra*.

722.713; MSA 25.493 affects only the right of illegitimate children, precluding them from obtaining additional support to meet changing needs where the parties have reached a settlement agreement pursuant to the statute. By contrast, there are no circumstances under which a legitimate child would be foreclosed from petitioning for future modification of child support. Pursuant to MCL 552.17(1); MSA 25.97(1), children of divorced couples may petition the court to modify a support award upon demonstrating changed circumstances, and the parents cannot bargain away the right to seek modification of support. See *Calley v Calley*, 197 Mich. App. 380, 382, n 1; 496 N.W.2d 305 (1992); *Johns v Johns*, 178 Mich. App. 101, 106; 443 N.W.2d 446 (1989). Therefore, I would conclude that the statute classifies children on the basis of illegitimacy and not on the basis of whether paternity has been legally determined.

Classifications based on illegitimacy are subject to heightened scrutiny. *Clark v Jeter*, 486 U.S. 456, 461; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988); *Spada v Pauley*, 149 Mich. App. 196, 203; 385 N.W.2d 746 (1986). To withstand heightened scrutiny, the statutory classification must be substantially related to an important governmental objective. *Clark, supra* at 461. This level of scrutiny "is not a toothless one." *Pickett v Brown*, 462 U.S. 1, 8; 103 S. Ct. 2199; 76 L. Ed. 2d 372 (1983), quoting *Mathews v Lucas*, 427 U.S. 495, 510; 96 S. Ct. 2755; 49 L. Ed. 2d 651 (1976). MCL 722.713; MSA 25.493 fails to satisfy this standard.

In upholding the statute, the majority concludes that the statute is substantially related to the "permissible, important, and even compelling governmental interest" of providing financial support for children. Slip op at 26. The majority reasons that the statute affords illegitimate children an "additional optional mechanism for obtaining support" by allowing the parties to circumvent the proof problems that may arise in paternity cases. Slip op at 33. I disagree.

I recognize that the problems in proving paternity distinguish legitimate children from illegitimate children in their claims for child support. However, this justification is neither "sufficiently weighty nor substantially related to the limitation" to uphold MCL 722.713; MSA 25.493 under equal protection. *Mills v Habluetzel*, 456 U.S. 91, 102; 102 S. Ct. 1549; 71 L. Ed. 2d 770 (1982) (O'Connor, J., concurring).[1] Nor are the state's interests in settlement and finality sufficient to justify a classification based on illegitimacy.

As noted earlier, children have a right to support. *Evink*, 214 Mich. App. at 175-176. However, rather than operate as an additional mechanism for support, the statute, in reality, imposes a burden on illegitimate children by restricting their ability to obtain adequate support. The Wisconsin Supreme Court made a similar conclusion when striking down a statutory scheme that precluded illegitimate children involved in lump-sum settlement agreements from seeking additional support, stating,

> It is an option that has in reality worked to the detriment of many nonmarital children. It is, at best, an illusory benefit amounting to no benefit at all. It is, in reality, an additional burden. [*Gerhardt v Estate of Moore*, 150 Wis. 2d 563, 571; 441 N.W.2d 734 (1989).]

The possibility that children may encounter circumstances that alter their need for support does not vary between illegitimate and legitimate children. Both may encounter circumstances that give rise to a need for increased support. Yet, in the case of illegitimate children, they may be deprived of the opportunity to seek increased support on the basis of changed circumstances because their parents entered an agreement, pursuant to the statute, that precludes

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[1] A total of five justices joined this section of Justice O'Connor's concurring opinion. *Mills, supra* at 102.

modification. Thus, the statute actually operates to their detriment.

In my opinion, neither proof problems nor the interests of settlement and finality outweigh the irrevocable and potentially damaging effect that a nonmodifiable settlement may have on the changing financial needs of illegitimate children. Consequently, the statute is not substantially related to the supposed interest it seeks to serve-namely, providing an additional mechanism for obtaining support for illegitimate children-and it should be determined to be violative of equal protection.

/s/ Elizabeth A. Weaver

PHYLLIS R. CREGO, a/k/a PHYLLIS R. SOCK,Plaintiff-Appellee, v KERMIT L. COLEMAN, Defendant-Appellant.
SC: 113485

SUPREME COURT OF MICHIGAN

461 Mich. 895; 603 N.W.2d 780; 1999 Mich. LEXIS 2457

October 26, 1999, Decided

PRIOR HISTORY: Wayne CC: 79-927194-DP. COA: 192798.

OPINION: On order of the Court, the application for leave to appeal from the October 23, 1998 decision of the Court of Appeals is considered, and it is GRANTED.

Seal of the Michigan the Supreme Court Lansing

I, CORBIN R. DAVIS, Clerk of Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court

October 26, 1999

/s/ Corbin R. Davis

PHYLLIS R. CREGO, a/k/a PHYLLIS R. SOCK, Plaintiff-Appellee, v KERMIT L. COLEMAN, Defendant-Appellant.
No. 192798

COURT OF APPEALS OF MICHIGAN

232 Mich. App. 284; 591 N.W.2d 277; 1998 Mich. App. LEXIS287

April 29, 1998, Submitted
October 23, 1998, Decided

Before: HOEKSTRA, P.J., and SAWYER, MCDONALD, MURPHY, NEFF, FITZGERALD, and WHITBECK, JJ.

NEFF, J. Pursuant to MCR 7.215(H), this special panel was convened to resolve the conflict between *Crego v Coleman*, 201 Mich. App. 443; 506 N.W.2d 568 (1993) (*Crego I*), and a later, vacated case involving the same parties, *Crego v Coleman*, 226 Mich. App. 815; 573 N.W.2d 568 (1997) (*Crego II*). At issue is the constitutionality of § 3 of the Paternity Act, MCL 722.13; MSA 25.493,[1] which allows the parties in a paternity action to reach a settlement barring future recovery or modification of child support. If not for the precedential effect of *Crego I*, the *Crego II* panel would have held the statute unconstitutional as violative of the equal protection guarantees of the United States and Michigan Constitutions. We agree with the analysis set forth in *Crego II*, and thus

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[1]MCL 722.713; MSA 25.493 was repealed by 1996 PA 308, effective June 1, 1997.

hold that MCL 722.13; MSA 25.493 is unconstitutional. Accordingly, we affirm the circuit court's order denying rehearing of an order granting plaintiff's motion for an increase in defendant's child support obligation.

I

In October 1978, plaintiff filed a paternity action alleging that defendant is the father of her daughter, who was born in August 1978. In 1980, the complaint was dismissed pursuant to a settlement agreement reached between the parties in which defendant agreed to pay weekly child support but did not acknowledge paternity. The trial court approved the terms of the settlement, as required by MCL 722.713; MSA 25.493, and ordered defendant to pay $20 a week in child support pending receipt of the friend of the court's formal recommendation. A second order was entered on September 26, 1980, requiring defendant to pay $35 a week. This second order specified the parties' intent that the support order be "not modifiable" and that the matter "shall stand settled, discontinued and dismissed" with respect to defendant. On January 30, 1981, after receiving the friend of the court recommendation, the court entered a third and final "permanent" order, which required defendant to pay $50 a week until the child's eighteenth birthday "or until further order of the court." Unlike the two previous orders, however, this order was not signed by the parties, nor did their attorneys approve its form or substance.

In the early 1990s, plaintiff filed a motion to modify the child support order. The trial court dismissed plaintiff's motion on the basis of res judicata. A divided panel of this Court affirmed, holding that the parties' settlement agreement was binding and precluded a modification of defendant's

support obligation.[2] Crego I, 201 Mich. App. at 447. The Court also rejected plaintiff's claim that MCL 722.713; MSA 25.493 denies children born outside marriage their constitutional right of equal protection of the law. *Id.* at 446.

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[2]Judge Griffin dissented, opining that the language of the trial court's final order allowed for modification. Crego I, 201 Mich. App. at 448.

Two years later, in *Dones v Thomas*, 210 Mich. App. 674; 534 N.W.2d 221 (1995), a different panel of this Court declared MCL 722.713; MSA 25.493 unconstitutional as violative of the constitutional guarantees of equal protection because it authorizes nonmodifiable child support awards in paternity actions, while child support awards in divorce actions always remain modifiable.[3] Following the decision in *Dones*, plaintiff renewed her motion for modification of the support order. The trial court concluded that it was required to follow *Dones*, even though it conflicted with *Crego I*, as long as the parties were afforded an opportunity to resolve any issue regarding paternity with blood tests if they so desired.

Defendant appealed, arguing that *Crego I* was controlling and that MCL 722.713; MSA 25.493 does not violate the equal protection clause. The panel in *Crego II* agreed that *Crego I* was controlling, but stated that if it were not required to follow *Crego I*, it would find the statute unconstitutional.

II

Children have an inherent right to parental support. *Evink v Evink*, 214 Mich. App. 172, 175-176; 542 N.W.2d 328 (1995). For children born in wedlock, but whose parents divorce or separate, our Legislature has provided statutory procedures to modify support orders. For example, MCL 552.17(1); MSA 25.97(1) provides:

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[3] The Court in Dones did not mention the previous decision in *Crego I*.

> The court may, from time to time after its issuance, on the petition of either of the parents, revise, and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children, as the circumstances of the parents, and the benefit of the children require.

Moreover, it is well settled that in a divorce action, the court may modify a support order even if the parties had entered into an agreement regarding support. Johns v Johns, 178 Mich. App. 101, 106; 443 N.W.2d 446 (1989); see also *Wiersma v Wiersma*, 241 Mich. 565, 566; 217 N.W. 767 (1928) ("'parents may not bargain away the children's welfare, . . . [and] the court may always do what seems reasonable and necessary to protect the children's rights'"). Similarly, children born outside marriage who are the subject of a filiation order are permitted to seek modification of child support orders, despite contrary agreements between the parties. *Boyles v Brown*, 69 Mich. App. 480; 245 N.W.2d 100 (1976); MCL 722.720; MSA 25.500.

In sharp contrast, the statute at issue here, MCL 722.713; MSA 25.493, provides as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.

(b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.

Thus, children born outside marriage who are not the subject of a filiation order are statutorily denied the right to seek modification of support orders, a right expressly granted to other children. Plaintiff argues that the denial of this right violates the constitutional guarantees of equal protection of the law. We agree.

III

The Equal Protection Clauses of the United States Constitution and the Michigan Constitution are coextensive, *Moore v Spangler*, 401 Mich. 360, 370; 258 N.W.2d 34 (1977), and provide that no person shall be denied equal protection of the law. U.S. Const, Am XIV; Const 1963, art 1, § 2. This constitutional guarantee requires that persons similarly situated be treated alike. *El Souri v Dep't of Social Services*, 429 Mich. 203, 207; 414 N.W.2d 679 (1987).

A

The first step in an equal protection analysis is to determine the appropriate level of judicial scrutiny. The reviewing court will use one of three tests, depending on the type of classification and the nature of the interest at issue. Where a statute creates an inherently suspect classification, such as race, alienage, ethnicity, and national origin or affects a fundamental interest, the "strict scrutiny" test applies. *Plyler v Doe*, 457 U.S. 202, 216-217; 102 S. Ct. 2382; 72 L. Ed. 2d 786 (1982). Under this test, the statute will be upheld only if the state "demonstrates that its

classification scheme has been precisely tailored to serve a compelling governmental interest." *Id.* at 217. The "rational basis" test is applied when the classification is not inherently suspect or a fundamental interest is not involved. *Id.* at 216. Under this test, the legislation is presumed to be constitutional and the party challenging the statute has the burden of proving that the legislation is arbitrary and thus irrational. *Manistee Bank & Trust Co v McGowan*, 394 Mich. 655, 668; 232 N.W.2d 636 (1975).

Under the third, or "substantial relationship" test, a statutory classification will be struck down as unconstitutional unless it is "substantially related to the achievement of the important governmental objective." *Dep't of Civil Rights ex rel. Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich. 173, 191; 387 N.W.2d 821 (1986) (emphasis in original). Without question, classifications based on illegitimacy are subject to this intermediate, or "heightened" scrutiny. *Clark v Jeter*, 486 U.S. 456, 461; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988); *Spada v Pauley*, 149 Mich. App. 196, 203; 385 N.W.2d 746 (1986). Therefore, we must determine whether the statute's classification, which denies children born outside marriage the right to seek modification of support on changed circumstances, is substantially related to an important state interest.[4]

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[4]Our dissenting colleague's assertion that heightened scrutiny may not be the appropriate test is based on an earnest but strained attempt to distinguish the clear holdings of Gomez v Perez, 409 U.S. 535; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973), and Frame v Nehls, 452 Mich. 171; 550 N.W.2d 739 (1996). In Frame, our Supreme Court held that a statute that made a grandparent's right to seek visitation rights dependent on whether the child's parents were involved in divorce proceedings was not subject to strict or heightened equal protection scrutiny because the statute did not discriminate on the basis of legitimacy of the child. Id. at 185. Only then did the Court proceed to use the "rational basis" test and find the grandparent visitation statute

B

The overriding purpose of the Paternity Act is to see that minor children born outside marriage are supported and cared for. *Whybra v Gustafson*, 365 Mich. 396, 400; 112 N.W.2d 503 (1961). This Court has stated, "The announced public policy of this state is to treat children born out of wedlock as no less deserving of support than those born in wedlock." *Smith v Robbins*, 91 Mich. App. 284, 289; 283 N.W.2d 725 (1979). We agree with the panel in *Crego II* that no "substantially related" state interest exists that would sustain the classification contained in MCL 722.713; MSA 25.493.[5]

In upholding the constitutionality of MCL 722.713;

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constitutional. Id. at 189. Unlike the situation presented in Frame, the discrimination of MCL 722.713; MSA 25.493 is clearly aimed solely at children born outside marriage whose fathers have settled a paternity suit without acknowledging paternity.

The dissent's position regarding the applicability of Gomez is similarly flawed. Whether MCL 722.713; MSA 25.493 contains provisions similar to the statutory scheme struck down in Gomez is not the issue. Rather, the case stands for the modern position that statutes that result in disparate treatment of legitimate and children born outside marriage are unconstitutional. Indeed, as the Court itself stated, "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez, supra* at 538.

[5]We note our disagreement with the dissent's focus on the effect of MCL 722.713; MSA 25.493 on mothers of children born outside marriage. Although support payments are made to the mother, the right to receive support belongs solely to the child. Evink, 214 Mich. App. at 175-176. Accordingly, the payment of support--or the denial of it--is a matter involving the equal protection rights of the child.

MSA 25.493, *Crego* I relied on the father's interest in a final settlement of paternity matters. In the context of divorce proceedings, our Legislature has determined that the need to allow a modification of child support on a change of circumstances outweighs the need for settlement and finality. MCL 552.17(1); MSA 25.97(1). We see no difference between the state's interest in settlement and finality in divorce proceedings and those same interests in actions under the Paternity Act that would justify treating children born outside marriage any differently than children generally. Indeed, as noted in *Crego II*, supra at 821, "legitimate and illegitimate children do not differ in their potential for encountering circumstances that may increase their need for financial support."

In *Gomez v Perez*, 409 U.S. 535; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973), the United States Supreme Court held that a state statute that granted legitimate children a judicially enforceable right of support from their natural fathers but denied the right to children born outside marriage was unconstitutional as a violation of the guarantee of equal protection. In so ruling, the Court stated:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." [*Id.* at 538.]

With this we heartily agree. MCL 722.713; MSA 25.493 provides that, unlike legitimate children, children born outside marriage who are not subject to a filiation order may be foreclosed from future modification of child support, regardless of need. This disparate treatment of children born outside marriage cannot withstand heightened scrutiny.[6]

We disagree with the dissent's assertion that the circumstances present when a child is born within marriage are objectively different in substance from the situation where a child is born outside marriage because in the latter case there is no presumptive father. Children, whether born within or without marriage, are the same with regard to their rights to support.

Further, as noted by *Crego II*, the factual determination of paternity is no longer a difficult credibility contest. Scientific advances regarding DNA testing now provide for a quicker, easier, and more accurate method for establishing paternity. In fact, a statutory presumption of paternity exists if a blood or DNA test establishes a probability of paternity of ninety-nine percent or higher. MCL 722.716(5); MSA 25.496(5). With these advances, there is no longer a difference between the state's interest in finality and settlement in paternity actions and divorce actions on the basis of difficulty of proof.

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[6]Other decisions of this Court have recognized that support may be modified in a paternity action when the order entered pursuant to the parties' settlement agreement itself provides for future adjustments, such as including the proviso, "until further order of the court." See Morrison v Richerson, 198 Mich. App. 202, 211; 497 N.W.2d 506 (1993); Van Laar v Rozema, 94 Mich. App. 619, 624; 288 N.W.2d 667 (1980). Unlike our dissenting colleague, we do not believe that a child's equal protection rights should hang on so narrow a thread.

IV

Children born outside marriage are no less deserving of support because of the circumstances of their birth than other children. If there is no limitation on the right of a legitimate child to seek modification of support, then there can be no such limitation on the same right for a child born outside marriage. The disparate treatment between children born outside marriage and legitimate children contained in MCL 722.713; MSA 25.493 violates the federal and state constitutional rights of a child born outside marriage to equal protection under the law. Accordingly, we hold MCL 722.713; MSA 25.493 is unconstitutional, and we affirm the trial court's order denying defendant's motion for rehearing of the order granting plaintiff's motion for modification of the earlier support agreement.

Affirmed.

SAWYER, MCDONALD, and MURPHY, JJ., concurred.

/s/ Janet T. Neff

/s/ David H. Sawyer

/s/ Gary R. McDonald

/s/ William B. Murphy

FITZGERALD, J. (concurring). I agree wholeheartedly with the majority's analysis and resolution. I write separately, however, in light of my dissenting colleague's sentiment that the issue of retroactivity should be addressed by the majority. While I express no opinion regarding the retroactive effect of the decision, I believe that the issue of retroactivity should be addressed in the interests of judicial economy.

/s/ E. Thomas Fitzgerald

WHITBECK, J. (dissenting) I respectfully dissent. The majority's decision holds unconstitutional a section of the Paternity Act that was on the books for over forty years, in the process substituting its judgment for that of the 1956 Legislature relative to the appropriate *means* for carrying out an *objective* that the majority finds perfectly acceptable. There is nothing in our judicial commissions that makes us better qualified than that Legislature to make such policy decisions, particularly in a situation where the disparate treatment that the majority uses to strike down the offending section could have been, and presumably often was, obviated by the fairly simple expedient of utilizing language in child support agreements that provided for later modifiability by the parties or by other order of the cognizant court. In my view, therefore, our voyage into judicial activism in this matter is an entirely unnecessary one.

I. STATUTORY PROVISIONS
A. SECTION 3 OF THE PATERNITY ACT

Section 3 of the Paternity Act, MCL 722.713; MSA 25.493 provided[1] as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child

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[1]The Legislature repealed § 3 of the Paternity Act effective June 1, 1997.

> shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.

As is readily apparent, and as a prior panel of this Court observed, subsection 3(b) of the Paternity Act prevented modification of the support order unless the parties provided for modification in the agreement, either specifically or by using language allowing modification "by other order of the court." See *Crego v Coleman*, 201 Mich. App. 443; 506 N.W.2d 568 (1993) (*Crego I*).[2] Stated differently, subsection 3(b) of the Paternity Act created a statutory bar to other remedies, in addition to those contained in the agreement, but was silent concerning what was required to be contained in the agreement itself.[3]

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[2] I, therefore and quite obviously, do not read *Crego I* as having held that § 3 of the Paternity Act precluded the parties from providing for modification of the agreement, despite the reference to the lack of authority for the circuit court to "modify the parties' agreement by entering a support order that was inconsistent with the parties' settlement of the paternity action that had previously been approved by the court." *Crego I*, *supra* at 447. Rather, I read this language, particularly in light of Judge Griffin's dissent, to mean that a majority of the *Crego I* panel believed that the circuit court could not, *sua sponte* and without the agreement of the parties, insert the phrase "or until further order of the court" in a support order. I regard this reading of *Crego I* as being the law of the case with respect to the modifiability of the support order.

[3] I observe, however, that subsection 3(b) of the Paternity Act required that the circuit court approve the agreement and that subsection 3(a) required that the circuit court make a determination that "adequate

B. THE DIVORCE STATUTES

The Michigan statutes relating to divorce contain at least three separate provisions relating to the modification of divorce and child support orders and decrees. See MCL 552.17(1); MSA 25.97(1), MCL 552.455(1); MSA 25.222(5)(1), MCL 552.517(1); MSA 25.176(17)(1). These provisions, both collectively and individually, explicitly allow for the modification of judgments of divorce and child support orders. Indeed as noted by the majority, in a divorce action the parties may not compromise their child's right to receive support. *Johns v Johns*, 178 Mich. App. 101, 106; 443 N.W.2d 446 (1989).

The majority, however, concludes that children born outside marriage who were not the subject of a filiation order were statutorily denied the right to seek modification of support orders, a right expressly granted to other children. This is, quite literally, incorrect. Rather, subsection 3(b) of the Paternity Act denied children born outside marriage who were not the subject of a filiation order the right to seek modification of support orders *unless the parties provided for modification in the agreement, either specifically or by using language allowing modification "by other order of the court."*[4] This distinction is, I contend, an extremely

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provision [for the child's support and education] is reasonably secured by payment or otherwise." Clearly, therefore, the statute required that the circuit court scrutinize the agreement independently to assure, at a minimum, that provision for the child's support and welfare was (a) "adequate" and (b) "reasonably secured by payment or otherwise." Beyond these minimum standards, subsection 3(b) of the Paternity Act was silent with regard to the contents of the agreement.

[4]We have judicially recognized such agreements. See *Crego I, supra*; *Hisaw v Hayes*, 133 Mich. App. 639, 643; 350 N.W.2d 302 (1984).

significant one: rather than being denied the right of modification, children born outside marriage were, under these circumstances, granted *exactly* the same right.

II. STANDARD OF REVIEW: THE THREE LEVELS OF CONSTITUTIONAL SCRUTINY

A. INTRODUCTION: THE GENERAL PRINCIPLES OF EQUAL PROTECTION

The majority, rather too quickly in my view, reaches the conclusion that, "[w]ithout question," classifications based on illegitimacy are subject to the form of intermediate constitutional review known as "heightened" scrutiny. *Ante*, p. 293. The majority does, however, correctly state that the Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the law. See US Const, Am XIV; Const 1963, art 1, § 2. See also *Frame v Nehls*, 452 Mich. 171, 183; 550 N.W.2d 739 (1996); *Spada v Pauley*, 149 Mich. App. 196, 203; 385 N.W.2d 746 (1986). In this regard, the Michigan and federal Equal Protection Clauses offer similar protection. *Doe v Dep't of Social Services*, 439 Mich. 650, 670-671; 487 N.W.2d 166 (1992). This constitutional guarantee requires that persons similarly situated be treated alike. *F S Royster Guano Co v Virginia*, 253 U.S. 412, 415; 40 S. Ct. 560; 64 L. Ed. 989 (1920); *El Souri v Dep't of Social Services*, 429 Mich. 203, 207; 414 N.W.2d 679 (1987). Indeed, this Court has held that the equal protection provisions of the federal and state constitutions are coextensive. *Neal v Oakwood Hosp Corp*, 226 Mich. App. 701, 716; 575 N.W.2d 68 (1997); *People v McFall*, 224 Mich. App. 403, 413; 569 N.W.2d 828 (1997).

Conversely, however, the United States Constitution does not require things that are different in fact or opinion to be

treated in law as though they were the same. *Jefferson v Hackney*, 406 U.S. 535, 549; 92 S. Ct. 1724; 32 L. Ed. 2d 285 (1972); *Reed v Reed*, 404 U.S. 71, 75; 92 S. Ct. 251; 30 L. Ed. 2d 225 (1971); *Tigner v Texas*, 310 U.S. 141, 147; 60 S. Ct. 879; 84 L. Ed. 1124 (1940). Stated differently, the courts have not interpreted the United States Constitution to require "'absolute equality.'" See *Doe, supra* at 661, citing *San Antonio Independent School Dist v Rodriguez*, 411 U.S. 1, 24; 93 S. Ct. 1278; 36 L. Ed. 2d 16 (1973). [5]

B. STRICT SCRUTINY

As the majority correctly states, when state legislation creates a classification scheme that is based upon suspect factors, such as race,[6] national origin,[7] ethnicity or alienage,[8]

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[5]Similarly, it is well established that the equal protection guarantee is not a source of substantive rights or liberties; rather, it is a measure of our constitutions' tolerance of government classification schemes. Doe, supra at 661, citing San Antonio Independent School Dist, supra, 411 U.S. 58 [sic, p 59] (Stewart, J., concurring).

[6]See *American States Ins Co v Dep't of Treasury*, 220 Mich. App. 586, 592-594; 560 N.W.2d 644 (1996). See also *Yick Wo v Hopkins*, 118 U.S. 356; 6 S. Ct. 1064; 30 L. Ed. 220 (1886); *Strauder v West Virginia*, 100 U.S. 303; 25 L. Ed. 664 (1879); Bickel, *The original understanding and the segregation decision*, 69 Harv L R 1 (1955).

[7] See *Oyama v California*, 332 U.S. 633; 68 S. Ct. 269; 92 L. Ed. 249 (1948); American States, 220 Mich. App. at 592-594.

[8]See *Nyquist v Mauclet*, 432 U.S. 1, 8, n 9; 97 S. Ct. 2120; 53 L. Ed. 2d 63 (1977); *El Souri, supra; Chan* v *City of Troy*, 220 Mich. App. 376; 559 N.W.2d 374 (1996). While Congress has broad power to regulate immigration and the status of aliens, "the States enjoy no power with respect to the classification of aliens." *Plyler v Doe*, 457 U.S. 202, 225; 102 S. Ct. 2382; 72 L. Ed. 2d 786 (1982). Only rarely is alienage a matter "relevant to legislation by a State." *Id.*

or that affects a fundamental interest,[9] courts apply a high standard of review, labeled "strict scrutiny." *People v Pitts*, 222 Mich. App. 260, 273; 564 N.W.2d 93 (1997). When courts review statutes under this strict standard, they uphold the statutes only "if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest." *Doe, supra* at 662, citing *Plyler v Doe*, 457 U.S. 202, 216-217; 102 S. Ct. 2382; 72 L. Ed. 2d 786 (1982). Rarely have courts sustained legislation under this standard of review. *Manistee Bank & Trust Co v McGowan*, 394 Mich. 655, 668; 232 N.W.2d 636 (1975). Justice Brennan, writing for the majority, laid out the rationale underlying the strict scrutiny analysis in *Plyler; supra* at 216-217, n 14:

> Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *Mclaughlin v Florida*, 379 U.S. 184, 192; 85 S. Ct. 283; 13 L. Ed. 2d 222 (1964); *Hirabāyashi v United States*, 320 U.S. 81, 100; 63 S. Ct. 1375; 87 L. Ed. 1774 (1943). Finally, certain groups,

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[9]See Harper v Virginia Bd of Elections, 383 U.S. 663, 672; 86 S. Ct. 1079; 16 L. Ed. 2d 169 (1966); Neal, 226 Mich. App. at 717-718.

indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist v Rodriguez*, 411 U.S. 1, 28; 93 S. Ct. 1278; 36 L. Ed. 2d 16 (1973); *Graham v Richardson*, 403 U.S. 365, 372; 91 S. Ct. 1848; 29 L. Ed. 2d 534 (1971); see *United States v Carolene Products Co*, 304 U.S. 144, 152-153, n 4; 58 S. Ct. 778; 82 L. Ed. 1234 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.[10]

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[10]There has not been unanimity on the United States Supreme Court that anything other than a "traditional" "rational basis" equal protection analysis should be used. See the dissents of Justice Harlan in *Katzenbach v Morgan*, 384 U.S. 641, 660-661; 86 S. Ct. 1717; 16 L. Ed. 2d 828 (1966) (reflecting his view that requiring a state to show a need greater than mere rational policy to justify classifications in the area of voting rights is not "consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause") and in *Shapiro v Thompson*, 394 U.S. 618, 658-663; 89 S. Ct. 1322; 22 L. Ed. 2d 600 (1969) (reflecting his insistence on judicial restraint lest the Court become a "super-legislature"). Justice Harlan summarized his view in his concurrence in Dandridge v Williams, 397 U.S. 471, 489; 90 S. Ct. 1153; 25 L. Ed. 2d 491 (1970), when he said:

The majority, again correctly in my view, declines to use the strict scrutiny test; § subsection 3(b) of the Paternity Act is not based upon suspect factors, nor does it affect a fundamental interest.

C. THE "TRADITIONAL" OR "RATIONAL BASIS" TEST

The "traditional" or "rational basis" test represents the other polar extreme. Under this standard, courts will not strike down a statute if the classification scheme it creates is rationally related to a legitimate governmental purpose. Justice Stewart articulated the test in *Dandridge v Williams*, 397 U.S. 471, 485; 90 S. Ct. 1153; 25 L. Ed. 2d 491 (1970):

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v Natural Carbonic Gas Co*, 220 U.S. 61, 78; 31 S. Ct. 337; 55 L. Ed. 369 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." *Metropolis Theatre Co v City of Chicago*, 228 U.S. 61, 69-70; 33

Except with respect to racial classifications, to which unique historical considerations apply, see Shapiro, at 659, I believe the constitutional provisions assuring equal protection of the laws impose a standard of rationality of classification, long applied in the decisions of this Court, that does not depend upon the nature of the classification or interest involved.

> S. Ct. 441; 57 L. Ed. 730 (1913). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. " *McGowan v Maryland*, 366 U.S. 420, 426; 81 S. Ct. 1101; 6 L. Ed. 2d 393 (1961).

In Michigan, courts have applied the rational basis test principally to economic and social[11] legislation. See *Manistee Bank; supra* at 668. Under the traditional or rational basis test, a classification will stand unless it is shown to be "'essentially arbitrary.'" *Id.*, quoting *Lindsley, supra*. Stated differently, one who attacks an enactment must show that it is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich. 231, 271; 301 N.W.2d 285 (1981). See also *In re Kasuba Estate*, 401 Mich. 560, 568-569; 258 N.W.2d 731 (1977); *McAvoy* v *H B Sherman Co*, 401 Mich. 419, 453-454; 258 N.W.2d 414 (1977). "Few statutes have been found so wanting in 'rationality' as to fail to satisfy the 'essentially arbitrary' test." *Manistee Bank; supra* at 668. Stated positively, the test is that courts must uphold a statutory classification where it is rationally related to a legitimate government purpose. *Doe, supra*, 439 Mich. 662; *American States Ins Co v Dep't of Treasury*, 220 Mich. App. 586, 592; 560 N.W.2d 644 (1996). The rational basis test "'reflects the judiciary's awareness that "it is up to legislatures, not courts, to decide on the wisdom and utility

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[11] In *Dandridge*, Justice Stewart, writing for the Court, noted that many of the previous United States Supreme Court cases applying the traditional or rational basis test had dealt with business and industry but then stated that there was no basis for applying a different constitutional standard to cases involving social welfare. *Dandridge, supra* at 485.

of legislation."" *Id.* at 597, quoting *Gronne v Abrams*, 793 F.2d 74, 77 (CA 2, 1986) (further citation omitted).

D. HEIGHTENED SCRUTINY

The United States Supreme Court formally adopted "intermediate" or "heightened" scrutiny for "illegitimacy" classifications in 1988 in *Clark v Jeter*, 486 U.S. 456; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988). In that case, Justice O'Connor, writing for a unanimous court, stated:

> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust." *Weber v Aetna Casualty & Surety Co*, 406 U.S. 164, 175; 92 S. Ct. 1400; 31 L. Ed. 2d 768 (1972). Yet, in the seminal case concerning the child's right to support, this Court acknowledged that it might be appropriate to treat illegitimate children differently in the support context because of "lurking problems with respect to proof of paternity." *Gomez v Perez*, 409 U.S. 535, 538; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973). [*Clark v Jeter, supra* at 461.][12]

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[12]As Justice Levin noted in his dissenting opinion in *Frame, supra* at 207-209, it can easily be argued that at least some of the United States Supreme Court's pre-1988 decisions regarding "illegitimacy" classifications are consistent with an intermediate form of constitutional review. See, e.g., *Pickett v Brown*, 462 U.S. 1, 8; 103 S. Ct. 2199; 76 L.

Ed. 2d 372 (1983) ("In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny."). See also Nowak & Rotunda, Constitutional Law (4th ed), § 14.14, p 719:

> This standard of intermediate scrutiny, which falls between the rational relationship test and the strict scrutiny test in terms of the strictness of the judicial review of classification, was not formally adopted for illegitimacy classifications until 1988. Nevertheless, the Supreme Court's pre-1988 decisions are consistent with this form of intermediate standard of review.

But see *Glona v American Guarantee & Liability Ins Co*, 391 U.S. 73, 75; 88 S. Ct. 1515; 20 L. Ed. 2d 441 (1968), where Justice Douglas, writing for the majority, arguably used the rational basis test in holding that a wrongful death statute that authorized actions by mothers of legitimate children but did not authorize actions by mothers of children born outside marriage denied the equal protection of the laws to the mothers in the latter class. See also the dissent by Justice Harlan, joined by Justices Black and Stewart, Glona, 391 U.S. at 76, describing the decision in Glona and the companion case of *Levy v Louisiana*, 391 U.S. 68; 88 S. Ct. 1509; 20 L. Ed. 2d 436 (1968), as "constitutional curiosities" in which the majority reached the answer to the question presented "by a process that can only be described as brute force." See also the acerbic dissent of Justice Rehnquist in *Trimble v Gordon*, 430 U.S. 762, 777; 97 S. Ct. 1459; 52 L. Ed. 2d 31 (1977), in which, in words echoing the earlier concerns voiced by Justice Harlan, he questioned the entire concept of taking equal protection analysis beyond a rational basis test in cases other than those involving race or national origin:

> The Fourteenth Amendment's prohibition against "any State . . . deny[ing] to any person . . . the equal protection of the laws" is undoubtedly one of the majestic generalities of the Constitution. If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted that Clause of the Amendment, there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law.
>
> Unfortunately, more than a century of decisions

Gomez involved facts considerably different than those involved in this matter. *Gomez* arose in Texas where, both at common law and under the statutes of the state, the natural father had "a continuing and primary duty to support his legitimate children. " *Gomez*, 409 U.S. at 536. However, there was no counterpart duty, either at common law or under the state statutes, for natural fathers to support their "illegitimate children." *Gomez*, 409 U.S. at 536-537. Thus, but for the fact that the child in *Gomez* was born outside marriage, she would have been entitled to support from her natural father. *Id.* at 537. Under such circumstances, the Court held:

> We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." [*Weber,*

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under this Clause of the Fourteenth Amendment have produced neither of these results. They have instead produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply--classifications based on race or on national origin, the first cousin of race--the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

supra] at 175. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.[13] [*Gomez,*

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[13]Although not central to my view in this matter, I note in passing that both the panel in Dones v Thomas, 210 Mich. App. 674, 677-679; 534 N.W.2d 221 (1995), and the panel in Crego v Coleman, 226 Mich. App. 815, 821; 573 N.W.2d 568 (1977) (Crego II), placed considerable reliance on recent scientific innovations in the area of testing for paternity as part of their rationale for finding § 3 of the Paternity Act to be unconstitutional. I first note that subsection 6(5) of the Paternity Act, MCL 722.716(5); MSA 25.496(5), creates a presumption of paternity when the "probability of paternity" after testing by DNA profile or other methods is ninety-nine percent or higher, but that a party may always rebut that presumption. Secondly, today's scientific "fact" may become tomorrow's heresy. See Conley, The First Principle of Real Reform: The Role of Science in Constitutional Jurisprudence, 65 NC L R 935, 942-943 (1987):

> I want to consider what guidance cases such as these can offer for future interactions between science and the law. To my mind, the fatal flaw in these cases is the misperception of science as a well oiled machine for generating truth, a process somehow less susceptible to human passion and error than is law. When science suggests the resolution of a legal problem, a lawmaker with this view may take comfort in rising above the admittedly human and inherently fallible process of traditional lawmaking--he may believe, in Holmes' words, that he is 'approaching the first principle of real reform.' [Referring to a letter by Justice Oliver Wendell Holmes mentioning Buck v Bell, 274 U.S. 200; 47 S. Ct. 584; 71 L. Ed. 1000 (1927), containing Justice Holmes' notorious statement that "three generations of imbeciles are enough." Id. at 207. Conley's premise is that this statement was based upon a belief that there was in 1927 an "irrefutable scientific basis for upholding the compulsory sterilization of a mentally retarded woman." Conley, 65 NC L R at 935.]
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> . . . The problem is that often the human frailty of science can be detected and exposed only by the trained insider. The outsider, even one as astute as Holmes, may confront a wall of superficial unanimity, and see no cause to inquire further.

supra at 538.]

Here, the statutory scheme is considerably different. Section 3 of the Paternity Act did not deny children born outside marriage the right of child support from their natural fathers; rather, it provided a mechanism for obtaining such support. The issue here relates to the modifiability of child support orders under subsection 3(b), an issue that the Court in Gomez did not come close to addressing. Thus, while perhaps "seminal" in the overall sense, the holding in Gomez is not particularly helpful in dealing with this issue.

The situation in Michigan is similarly somewhat mixed. The Michigan Supreme Court clearly has adopted the United States Supreme Court's definition of heightened scrutiny. See *Dep't of Civil Rights ex rel. Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich. 173, 191; 387 N.W.2d 821 (1986):

So what is the law to do? In my view, it should respond with extreme care when science demands that new legal doctrine be created or established doctrine be altered radically. The more strident the demand, the more cautious it should be. Above all, judges and legislators should look skeptically at the scientific process, remembering that such terms as 'fact,' 'truth' and 'law' are, in most cases, as relative for scientists as they are for the rest of us.

* * *

. . . The findings of science sometimes have appealed to lawmakers as a simple substitute for the complex interaction among precedent, facts, and values that comprise legal decisionmaking, and as a source of certainty in an otherwise uncertain world. But the appeal of science as a first principle of real reform has been often illusory, and sometimes dangerous. If the Constitution is 'to endure for ages to come' in the face of technological challenge, real reform must continue to be inspired by the document itself and the eminently human processes it has spawned.

> Under this level of scrutiny, there are two determinations that must be made. The first question is whether the classification serves an important governmental interest. The second question is whether the classification is substantially related to the achievement of the important governmental objective. *Craig v Boren*, 429 U.S. 190, 197; 97 S. Ct. 451; 50 L. Ed. 2d 397 (1976), *reh den.* 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed. 2d 574 (1977). [Emphasis in original.]

Waterford Twp, however, involved an allegation of gender discrimination, as did *Craig v Boren*. The most recent Michigan Supreme Court case involving an allegation of discrimination based on illegitimacy is *Frame, supra.* One of the questions presented in that case was whether § 7b, MCL 722.27b; MSA 25.312(7b), of the Child Custody Act, MCL 722.21 et seq.; MSA 25.312(1) et seq., unconstitutionally deprived the paternal grandfather of a child born outside marriage equal protection of the law. (The Court referred to § 7b as the "grandparent visitation statute.") In *Frame*, the mother of the child filed a complaint (apparently under the Paternity Act) to determine paternity. *Frame, supra* at 175. The father admitted paternity, and the circuit court entered an order of filiation, awarding the mother custody and awarding the father regular visitation. Id. The child's paternal grandfather then petitioned the circuit court for grandparent visitation under the grandparent visitation statute. *Id.* The mother moved for summary disposition (rejecting the petition), and the circuit court granted that motion. The grandfather appealed and this Court reversed. *Frame v Nehls*, 208 Mich. App. 412; 528 N.W.2d 773 (1995). This Court specifically applied heightened scrutiny to classifications based on illegitimacy:

> Classifications based on illegitimacy are subject to intermediate or "heightened" scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Clark* [*supra*, 486 U.S. 461]; and see *Gerhardt v Estate of Moore*, 150 Wis. 2d 563; 441 N.W.2d 734 (1989) (statutory scheme similar to Michigan's statute invalidated on equal protection grounds). [208 Mich. App. at 415.]

The Michigan Supreme Court, however, reversed. Justice Boyle, writing for the majority, stated that "the classification created involves neither a suspect class, [sic] nor a fundamental right, *is rationally related to a legitimate government purpose*, and does not violate equal protection." *Frame, supra*, 452 Mich. 174-175 (emphasis supplied). In responding to the grandfather's assertion (relying on *Clark supra*, and *Dones v Thomas*, 210 Mich. App. 674; 534 N.W.2d 221 [1995]) that heightened scrutiny must be used, the majority found, after reviewing the statute as a whole, that "the Legislature did not create classifications using legitimacy as a factor." *Frame, supra*, 452 Mich. 185. Citing *Califano v Boles*, 443 U.S. 282, 296; 99 S. Ct. 2767; 61 L. Ed. 2d 541 (1979),[14] the majority held that the incidental

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[14]Califano v Boles, 443 U.S. 282; 99 S. Ct. 2767; 61 L. Ed. 2d 541 (1979), holds that a provision of the federal Social Security Act, 42 USC 402(g)(1), making "mother's insurance benefits" payable only to divorced spouses and surviving spouses of wage earners, but not to unwed mothers, is not a classification on the basis of illegitimacy because any effect on children born outside marriage is incidental and, to a large degree, speculative. (Although the language of 42 USC 402[g][1] as then in effect limited eligibility for "mother's insurance benefits" to females, the gender-based exclusion of males from eligibility for these benefits had been held to violate the equal protection component of the Fifth Amendment's Due Process Clause in Weinberger v Wiesenfeld, 420 U.S. 636; 95 S. Ct. 1225; 43 L. Ed. 2d 514 [1975].)

effect on children born outside marriage as a class "'is not sufficient'" to warrant heightened scrutiny analysis. Frame, supra, 452 Mich. 189. The majority then explicitly used a rational basis test to find the grandparent visitation statute constitutional:

> The classifications created under the grandparent visitation statute are grandparents whose child is deceased or involved in a custody dispute (who may seek visitation) and grandparents whose child is alive or not involved in a custody dispute (who may not seek visitation). *Because there is no fundamental right or suspect classification involved, a rational basis test is used. Under this test, the grandparent visitation statute will be upheld as long as the classifications therein are rationally related to a legitimate governmental purpose. Doe*, 439 Mich. at 662. [*Frame, supra* at 189 (emphasis supplied).]

Thus, at least in Frame, the highest court in this state has declined to use heightened scrutiny in a case involving the allegation of statutory denial of equal protection based on illegitimacy. Panels of this Court have, however, not been so reluctant to apply the heightened scrutiny test. In two cases that this Court decided before the formal adoption by the United States Supreme Court of heightened scrutiny for illegitimacy classifications in *Clark, supra*, this Court relied on the reasoning of pre-Clark United States Supreme Court cases--in particular, *Gomez* -- in reviewing statutory

classifications alleged to be based on illegitimacy.[15] In addition, the *Dones* panel[16] and the panel in *Crego v Coleman*, 226 Mich. App. 815; 573 N.W.2d 568 (1997), (*Crego II*)[17] used the heightened scrutiny hallmark language of whether the challenged classification is "substantially related to permissible state interests."

On the other hand, this Court's approach has not been uniform on this point. In *Hisaw v Hayes*, 133 Mich. App. 639, 644-645; 350 N.W.2d 302 (1984), the panel, after discussing contractual considerations, addressed the equal protection aspects of the Paternity Act:

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[15]See *Boyles v Brown*, 69 Mich. App. 480, 483; 245 N.W.2d 100 (1976) ("more recently, the United States Supreme Court, in *Gomez [supra]* found disparate statutory treatment between legitimate and illegitimate children to be constitutionally invalid") and *Spada, supra* at 203 ("Both article 1, § 2 of the Michigan Constitution and the Fourteenth Amendment to the United States Constitution provide that no person shall be denied the equal protection of the law. Classifications based on illegitimacy are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests," citing *Pickett, supra*, and *Gomez, supra* at 538.)

[16]See Dones, supra at 677:

> Classifications based upon illegitimacy violate the Equal Protection Clauses of U.S. Const, Am XIV, and Const 1963, art 1, § 2, unless they are substantially related to permissible state interests. Spada [149 Mich. App. at 203.] The question then is whether the different treatment of legitimate and illegitimate children with respect to the modifiability of an award of support is substantially related to a permissible state interest. We are not persuaded that it is.

[17]See *Crego II, supra* at 818:

> Classifications based on illegitimacy are subjected to intermediate or "heightened scrutiny" and are unconstitutional unless "substantially related to permissible state interests." *Spada, supra* at 203.

> In *Gomez [supra]*, the Court held that a statutory scheme which required natural fathers to support their legitimate children but not their illegitimate children amounted to a denial of equal protection. However, equal protection does not require that things different in fact be treated as though they were the same. *Tigner [supra* at 147]. The difference between a paternity case and a case involving support for legitimate children is the necessity of proving paternity in the former case. Due process requires that a litigant be afforded a fair trial of the issues involved in the controversy and a determination of disputed questions of fact on the basis of evidence. . . . The right of an illegitimate child to equal protection of law does not justify depriving the alleged father of the right to a trial of a disputed question of paternity. We decline to follow *Boyles [v Brown*, 69 Mich. App. 480; 245 N.W.2d 100 (1976),] to the extent that, in a paternity settlement like that at issue here, it would permit a court to increase an alleged father's support obligation, albeit leaving him bound by his agreement to surrender his right to a judicial determination of paternity. Such a settlement cannot be modified, the only judicial remedy being recision.

And, of course, in *Crego I*, the panel declined to follow Boyles and followed *Hisaw*, thereby at least implicitly refusing to utilize the heightened scrutiny test.

Clearly, then, the situation with respect to the application in Michigan of heightened scrutiny to classifications alleged

to be based on illegitimacy is anything but clear. I am considerably troubled by the fact that the majority has declined, without meaningful explanation,[18] to follow the example set in the most recent Michigan Supreme Court case, Frame, supra, in which classifications touching on illegitimacy were a significant issue and in which that Court explicitly applied the rational basis test. My concern is

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[18] In a footnote, the majority refers to the dissent's "earnest but strained" attempt to distinguish Gomez and Frame. Ante, 232 Mich. App. at 293, 591 N.W.2d at 280, 1998 Mich. App. LEXIS 287 at *9 n 4. While (perhaps) being complimentary, I believe the majority misses the point of Frame. Certainly, the majority in Frame found that the Legislature did not create classifications using legitimacy as a factor. Frame, 452 Mich. at 185. However, the majority's contention that "only then" did the Court in Frame proceed to use the rational basis test is incorrect. *Ante* at 293, n 4. Rather, the Court had previously determined to use the rational basis test, 452 Mich. at 174-175, and made its comments about the classifications using legitimacy as a factor in response to the grandfather's assertion that heightened scrutiny must be used. (Certainly, the Court again later in its opinion referred to its use of the rational basis test: "Because there is no fundamental right or suspect classification involved, a rational basis test is used." Frame, 452 Mich. at 189. However, as the quotation itself makes clear, the Court rather clearly was of the opinion that the choice of tests under the facts presented was between strict scrutiny and rational basis.) I also note that the only parties in the case before us are the mother, plaintiff, and the acknowledged father, defendant. The child of the parties is not a party, and the increased child support payments being sought would not be paid directly to the child but rather to plaintiff. Accordingly, one hypothetical situation that we arguably need not deal with is whether application of § 3 of the Paternity Act to bar an action by a child born outside marriage in the child's own right for increased or back child support would violate the child's equal protection rights. One could therefore narrowly frame the question before us, in parallel with the Michigan Supreme Court's framing of the question in Frame, as whether § 3 of the Paternity Act violated the equal protection rights of the mother of a child born outside marriage.

heightened by the fact that the majority pays no attention whatever to fundamental principles of judicial deference.

E. THE PRINCIPLES OF JUDICIAL DEFERENCE

There is almost universal agreement that the power of the Legislature is not without limits. See *Marbury v Madison*, 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803): "[T]hat those limits may not be mistaken, or forgotten, the Constitution is written." And, as the Michigan Supreme Court stated in *Manistee Bank*, supra at 666: "[T]hat those limits not be exceeded, the courts are entrusted with the responsibility to review and the power to nullify legislative acts which are repugnant to the constitution."

Nevertheless, courts are to use this authority sparingly. "Under established rules of statutory construction, statutes are presumed constitutional, and courts have a duty to construe a statute as constitutional unless unconstitutionality is clearly apparent." *Mahaffey v Attorney General*, 222 Mich. App. 325, 344; 564 N.W.2d 104 (1997). As the Michigan Supreme Court stated in *Council of Organizations & Others for Education About Parochiaid, Inc v Governor*, 455 Mich. 557, 568; 566 N.W.2d 208 (1997), citing *United States v Raines*, 362 U.S. 17, 21; 80 S. Ct. 519; 4 L. Ed. 2d 524 (1960), "When compelled to make a constitutional pronouncement, the court must do so with great circumspection and trepidation, with language carefully tailored to be no broader than that demanded by the particular facts of the case rendering such a pronouncement necessary." Further, in *General Motors Corp v Attorney General*, 294 Mich. 558, 568; 293 N.W. 751 (1990), the Court stated:

> The court will not go out of its way to test the operation of a law under every

> conceivable set of circumstances. The court can only determine the validity of an act in the light of the facts before it. Constitutional questions are not to be dealt with in the abstract.

Indeed, the party challenging the facial constitutionality of an act "'must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . ." *Council of Organizations, supra* at 568, quoting *United States v Salerno*, 481 U.S. 739, 745; 107 S. Ct. 2095; 95 L. Ed. 2d 697 (1987).

Thus, this Court should presume § 3 of the Paternity Act to be constitutional unless its unconstitutionality is clearly apparent. Further, in ruling concerning this constitutional challenge, this Court should carefully tailor its language to the particular facts of this case. This Court should not go out of its way to test the operation of § 3 under every conceivable set of circumstances, nor should it deal with the constitutional question in the abstract. Rather, this Court should recognize that the fact that § 3 might operate unconstitutionally under some conceivable set of circumstances is insufficient. In my view, the majority opinion violates each of these precepts, and indeed does so without acknowledging their very existence.

For example, the majority asserts that children born outside marriage and not subject to a filiation order "*may be* foreclosed from future modification of child support, regardless of need." *Ante* at 295, (emphasis supplied). It is equally true, however, that such children born outside marriage were *not* foreclosed from future modification of child support if the parties provided for modification in the

agreement, either specifically or by using language allowing modification "by other order of the court." The majority characterizes this distinction as a "narrow . . . thread." *Ante* at 295, n 6. I regard it as central. The majority uses the fact that subsection 3(b) of the Paternity Act may have operated discriminatorily in *some* circumstances as the peg upon which to hang its conclusion that it was therefore unconstitutional *in all circumstances* on equal protection grounds. It seems to me that, under well-recognized principles of judicial deference to legislative enactments, we should take exactly the opposite approach: if subsection 3(b) of the Paternity Act operated *exactly the same as* the counterpart provisions in the divorce statutes in *some* circumstances, it was therefore constitutional on equal protection grounds. The majority's approach, in my view, allows the constitutionality of an enacted statute to hinge on the tenacity--or the lack thereof--of a party in a paternity proceeding or the skill--or the lack thereof--of that party's lawyer in negotiating a support order that provides for later modification. This, indeed, is a "narrow thread."

III. THE CONSTITUTIONALITY OF § 3 OF THE PATERNITY ACT

A. TREATMENT OF THE TWO CLASSIFICATIONS

Plaintiff's basic position here is that § 3 of the Paternity Act created an impermissible classification based on whether the mother of a child was married to the father at the time of the child's conception or birth. She thus claims that she, and others similarly situated in the same classification under § 3 of the Paternity Act, are treated differently than mothers of children within marriage who seek modification of child support under the divorce statutes, the second classification. The majority agrees. I do not. In my view, § 3 of the Paternity Act did not *create* such an impermissible

classification as it did not *require* that the mother of a child born outside marriage, such as plaintiff, be treated differently from the mother of a child born within marriage when seeking modification of child support. First, the Paternity Act did not require plaintiff to enter any paternity agreement with defendant whatsoever. Moreover, plaintiff could have insisted on the inclusion of a term in the paternity agreement allowing for modification of support, either specifically or by reference to "other order of the court," as a precondition to entering the agreement. By its silence, subsection 3(b) of the Paternity Act did not bar such an agreement and, as I have previously noted, we have judicially recognized such agreements. Had the parties entered into such an agreement here and had the circuit court approved it, plaintiff would have, been in exactly the same *position* with respect to the ability to seek modification of the amount of child support as if she and defendant had conceived their child within marriage.[19]

Although involving a different context, the equal protection issue in *McFall, supra*, is instructive. In that case, a jury convicted the defendant of assault with intent to commit criminal sexual conduct involving sexual penetration[20] and fourth-degree criminal sexual conduct.[21] The defendant argued that the trial court violated his constitutional right to equal protection when it read CJI2d

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[19]If defendant had declined to enter a child support agreement with such a provision allowing for modification by the circuit court of the level of child support, then plaintiff, like the mother of a child born inside marriage, could have sought a judicial award of child support without defendant's consent.

[20]MCL 750.520g; MSA 28.788(7).

[21]MCL 750.520e(1)(a); MSA 28.788(5)(1)(a).

20.25,[22] which informed the jury that evidence other than the complainant's testimony was not necessary to prove a charge if that testimony proved guilt beyond a reasonable doubt. *McFall, supra* at 413. The defendant argued that this violated the right to equal protection of defendants in cases involving charges of criminal sexual conduct "by exalting the complainants [in criminal sexual conduct cases] above other crime victims by instructing jurors that their testimony alone can justify conviction." *Id.* The *McFall* panel rejected the defendant's equal protection argument because the instruction could have been given in cases that did not involve criminal sexual conduct charges:

> Defendant's argument must fail because his premise, that CJI2d 20.25 is given only in cases involving charges of criminal sexual conduct, is without factual support. This Court is aware of no authority, nor has defendant cited any, establishing that this instruction cannot be given in cases involving other offenses. Moreover, it is well established that trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the official sanction of the Michigan Supreme Court. *People v Petrella*, 424 Mich. 221, 277; 380 N.W.2d 11 (1985).
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> Defendant has failed to demonstrate that the circuit court treated him less favorably than it would have treated a similarly situated defendant not charged with criminal sexual conduct. Accordingly, defendant has not

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[22] An instruction from the "Sex Crimes" chapter of the second edition of the Michigan Criminal Jury Instructions.

established that the court's use of CJI2d 20.25 violated his right to equal protection under the laws. *[McFall*, 224 Mich. App. at 413-414.]

McFall differs from this case: *McFall* involved the "standard" criminal jury instructions, which the trial courts are not required to use, while this case involves a statute that had the force of the law. Nevertheless, this case is analogous to *McFall* in that § 3 of the Paternity Act did not ***require*** that plaintiff, as the mother of a child born outside marriage seeking modification of a child support agreement, be treated differently from the mother of a child born within marriage seeking modification of a child support agreement. In essence, the inclusion of CJI2d 20.25 only in the "Sex Crimes" chapter of the Michigan Criminal Jury Instructions created a "default situation" in which it might have required extra effort or thought for a prosecutor to obtain a "no corroboration required" instruction in a case that did not involve a criminal sexual conduct charge. Similarly, § 3 of the Paternity Act created a "default situation" in which the mother of a child born outside marriage who entered a child support agreement could not later seek modification of the level of child support in the agreement ***unless*** the mother insisted that the agreement include a specific provision allowing for modification or the "other order of the court" language. Thus, § 3 of the Paternity Act did not violate plaintiff's constitutional right to equal protection, because it did not ***require*** that she be treated differently than the mother of a child born within marriage.

B. THE APPLICATION OF THE RATIONAL BASIS TEST

If this Court were to follow the lead of the Michigan Supreme Court in *Frame*, we could certainly conclude that, with regard to its effect on mothers of children born outside

marriage, such as plaintiff, we may review § 3 of the Paternity Act under the "rational basis" test. Under this test, this Court should uphold § 3 of the Paternity Act as long it bears a rational relationship to a legitimate governmental purpose. See *Frame, supra*, 452 Mich. at 189.

In applying a rational basis review, the Court should recognize that "[t]he lines [were] drawn where they [were] because the Legislature put them there. As long as these lines survive rational basis review . . . this Court must defer to the legislative policy choices." *Id.* at 191, n 27. In short, this Court should review the constitutionality of legislation, not its wisdom.[23] n23 By allowing parties to agree voluntarily to a scheme precluding modification of a child support order, § 3 of the Paternity Act could have increased the financial incentive for a putative father to acknowledge paternity. Also, by providing this option, the Legislature may reasonably have sought to facilitate settlement agreements between the mother and the putative father that would avoid the intense animosity often associated with litigation and thereby encourage the development of a satisfactory father-child relationship. While the majority emphasizes technological developments regarding the determination of paternity as a reason to hold § 3 of the Paternity Act unconstitutional, such technological developments did not

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[23]In this regard, I note that developments in technology used to provide evidence of paternity, or perhaps concerns about fairness to children born outside marriage and their mothers, may have influenced the Legislature's decision to repeal § 3 of the Paternity Act effective June 1, 1997. My view that § 3 of the Paternity Act had a rational basis certainly does not reflect any disapproval of the Legislature's decision to repeal that statute, but merely is a recognition that, within constitutional limits, the Legislature has broad power to determine matters of public policy. With the repeal of § 3 of the Paternity Act, it is clear that the default prohibition on modification of child support orders has now been prospectively removed by the Legislature.

eviscerate the reasonableness of § 3 of the Paternity Act in facilitating the relatively amicable settlement of paternity disputes. If the rational basis test were to be applied, I would conclude that § 3 of the Paternity Act was constitutional as applied in this case because it bore a rational relationship to a legitimate government objective.

C. THE APPLICATION OF THE HEIGHTENED SCRUTINY TEST

If, however, this Court chooses to depart from the Michigan Supreme Court's lead in *Frame* and to look more broadly at subsection 3(b) of the Paternity Act so as to conclude that it does, although indirectly but nevertheless in fact, affect the equal protection rights of the child born outside marriage, this Court then arguably is compelled to apply the heightened scrutiny test. Under this test, a statutory classification must be substantially related to an important governmental objective. Here, discerning the objective of the Paternity Act is relatively easy. Clearly, the objective of the Paternity Act is to provide a mechanism for assuring support for children born outside marriage. Indeed, this Court has stated that "the purpose of the Paternity Act is to provide for the support of an illegitimate child." *Smith v Robbins*, 91 Mich. App. 284, 289; 283 N.W.2d 725 (1979). See also, *id*, citing *Boyles, supra*, to the effect that "[t]he announced public policy of this state is to treat children born out of wedlock as no less deserving of support than those born in wedlock."

There is also very little question that this objective is an important one. The issue under the heightened scrutiny test, then, is whether the statutory mechanism in § 3 of the Paternity Act was "substantially related" to the important governmental objective of providing for the support of children born outside marriage. I would hold that it was.

I first note, however, as did Justice Rehnquist dissenting in *Trimble v Gordon*, 430 U.S. 762, 783-784; 97 S. Ct. 1459; 52 L. Ed. 2d 31 (1977), that this type of review puts a court in the position of finding a legitimate, important objective that the Legislature in its wisdom adopted and then considering whether the very same Legislature was astute enough to adopt an appropriate mechanism to achieve that objective. As Justice Rehnquist observed:

> If the great difficulties . . . [of ascertaining legislative intent] are surmounted, this Court then takes it upon itself to inquire into whether the Act in question accomplished the "purpose" which the Court first determines the legislature had in mind. It should be apparent that litigants who wish to succeed in invalidating a law under the Equal Protection Clause must have a certain schizophrenia if they are to be successful in their advocacy: They must first convince this Court that the legislature had a particular purpose in mind in enacting the law, and then convince it that the law was not at all suited to the accomplishment of that purpose.
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> But a graver defect than this in the Court's analysis is that it also requires a conscious second-guessing of legislative judgment in an area where this Court has no special expertise whatever. Even assuming that a court has properly accomplished the difficult task of identifying the "purpose" which a statute seeks to serve, it then sits in judgment to consider the so-called "fit" between that "purpose" and the statutory means adopted to achieve it. In most cases, and all but

> invariably if the Court insists on singling out a unitary "purpose," the "fit" will involve a greater or lesser degree of imperfection. Then the Court asks itself: How much "imperfection" between means and ends is permissible? In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper. What alternatives were reasonably available? What reasons are there for the legislature to accomplish this "purpose" in the way it did? What obstacles stood in the way of other solutions?
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> The fundamental flaw, to me, in this approach is that there is absolutely nothing to be implied from the fact that we hold judicial commissions that would enable us to answer any one of these questions better than the legislators to whose initial decision they were committed. Without any antecedent constitutional mandate, we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks. [*Id.*]

Here, the majority engages in exactly this process. It finds the overriding purpose of the Paternity Act to be assuring that minor children born outside marriage receive support and care. Clearly, then, the majority believes the 1956 Legislature to have been wise enough to perceive a legitimate need and concerned enough to pass legislation to address that need. However, in the next breath, the majority condemns the 1956 Legislature for being so dim as to adopt

mechanisms that provided for "disparate treatment" of the very children that same Legislature sought to benefit. To use Justice Rehnquist's analogy, the majority first takes the 1956 Legislature to school and then administers a rather public judicial spanking by substituting its judgment concerning the "fit" between objectives and means. As did Justice Rehnquist, I find nothing in our judicial commissions that gives us superior qualifications to those of the 1956 Legislature to effect such a substitution.

I also note that the circumstances present when a child was born within marriage and, thus, with a presumptive biological father were objectively different in substance from the situation where a child is born outside marriage with no individual male readily apparent as the presumptive father. The majority disagrees with this assertion and states that "[c]hildren, whether born within or without marriage, are the same with regard to their rights to support." *Ante* at 296.

While this is an attractive statement rhetorically--and as a truism it is certainly beyond debate--it misses the point. When subsection 3(b) was enacted in 1956, DNA testing was not even a gleam in a scientist's eye and identifying the putative father was not a matter of science but of largely anecdotal evidence. While in hindsight this seems quaint, the fact remains that, objectively, a substantive difference did exist between the factual circumstances surrounding the birth of a child within marriage and the birth of a child outside marriage. Standing alone, this is not a basis for upholding disparate treatment. Nevertheless we cannot avert our eyes from the circumstances that existed at the time the statute was enacted. In any event, it certainly will not do to assert a generalized equal right to child support payments as the deciding principle in this case without also showing a statutory violation of that right. Here, as I have repeatedly emphasized throughout this dissent, subsection 3(b) of the

Paternity Act treated children born outside marriage *exactly the same as* children born within marriage under circumstances where the agreement allowed for modification of support, either specifically or by reference to "other order of the court."

In addition, it seems clear to me that the substantial relationship of § 3 of the Paternity Act to the objective of providing for the support of children born outside marriage was that it facilitated and regulated the formation of child support agreements. Thus, the mechanism that § 3 provided was as substantially related to the objective of the Paternity Act as the mechanisms provided in MCL 552.17(1); MSA 25.97, MCL 552.455(1); MSA 25.222(5)(1), and MCL 552.517(1); MSA 25.176(17)(1) are to the same or similar objectives of the divorce statutes. Thus, in my view, § 3 of the Paternity Act was constitutional even when we examine it under the more rigorous standard of the heightened scrutiny test.

D. CONCLUSION

I would find that § 3 of the Paternity Act was not clearly unconstitutional in its application. I do not view the fact that, under the law of *this* case, plaintiff could not modify the agreed-upon support provision to be dispositive, for we are not required to test the operation of § 3 under *every* set of circumstances. Rather, mothers of children born outside marriage were treated exactly the *same* as mothers of children born within marriage under one set of circumstances: where the child support agreement contained a specific provision allowing the modification or the "other order of the court" language. Further, there was a substantial justification for the enactment of this mechanism for the support of a child born outside marriage, given the objective differences at the time the Legislature adopted the statute

between such a situation and one in which a child was born within marriage. Overall, the Legislature's action in adopting § 3 of the Paternity Act was reasonable. In making this assertion, I do not deal with the constitutional question in the abstract, but would rather adhere to our duty to construe the statute as constitutional unless its unconstitutionality is clearly apparent.

IV. RETROACTIVITY

The majority makes no holding concerning--indeed, it makes no reference to--the issue of the retroactive[24] effect of its decision. Inasmuch as the Paternity Act was enacted in 1956, I think it safe to assume that literally thousands of cases were brought under its provisions and that a fair number resulted in nonmodifiable child support agreements under § 3. The effect of the majority's decision is to allow these agreements to be reopened. Presumably, it is the majority's intent to allow women, [25]including plaintiff, who are the mothers of children who are covered by these agreements to reopen their cases in order to obtain modification of the agreements. However, presumably, defendant and other similarly situated putative fathers may in response contest the issue of paternity. What, then, if the putative father, using modern DNA testing methods, is now "cleared" of paternity? Will such an individual be able to

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[24]The decision can have no prospective effect because the Legislature repealed § 3 of the Paternity Act effective June 1, 1997.

[25]Such a result seems inevitable in light of the fact that, presumably, a defendant father in a paternity suit gave up his right to contest paternity in return for a nonmodifiable support agreement. See *Hisaw*, *supra* at 644-645. If the defendant father now loses nonmodifiability, he certainly regains the right to contest paternity.

obtain reimbursement of the total amount of child support he paid for a child born outside marriage from the mother of that child?[26]

In this regard, I note that in some--and perhaps many--cases, the mother may have had a good-faith basis for believing that the man involved was the biological father, although she was honestly mistaken. Requiring such a woman to make "restitution" of years of child support payments could impose a tremendous hardship, literally to the point of bankruptcy. Also, putative fathers may in many cases still be making child support payments pursuant to child support agreements. If in a significant number of these cases the men involved are now able to disprove paternity and renounce those agreements, will the children born outside marriage be henceforward deprived of any "paternal" child payments whatsoever?

A practical answer to these troubling questions would be to give the decision in this matter "limited retroactive effect." We have typically used this phrase to refer to a holding that articulates a rule of law that is to be applied to (1) future cases or circumstances (a circumstance not involved here)

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[26]To push the point one step further, there is nothing in the majority's decision that limits a putative father, absent an action by the mother to reopen the child support agreement, from independently commencing an action to reopen that agreement in an attempt to disprove his paternity. Given modern DNA testing methods and assuming a certain amount of prudence on behalf of that putative father, one would suspect that such an action would, if commenced, be successful. The same troubling questions would then arise. Would the mother then be required to make "restitution" of past child support payments? Would the child then be deprived of the benefit of future child support payments? The majority's decision leaves the answer to these questions for another day. Given the litigious nature of our society, I suspect that such a day will not be long in coming.

and (2) to only certain cases or circumstances that were initiated before the opinion, i.e., to cases in which direct appellate review is still pending. See, e.g., *Jahner v Dep't of Corrections*, 197 Mich. App. 111, 115; 495 N.W.2d 168 (1992); *Seder v Peoples Community Hosp Authority*, 169 Mich. App. 238, 241; 425 N.W.2d 775 (1988). However, the majority articulates no such limiting principle in its opinion. I think it fair to predict that while the resulting litigation may not particularly endear us to the trial bench, it certainly will to the family law bar.

V. CONCLUSION

I would vacate the circuit court's order granting plaintiff's motion for an increase in defendant's agreed-upon child support payments on the basis that § 3 of the Paternity Act was constitutional. However, if I agreed with the majority's resolution of that issue, I would give today's decision limited retroactive effect.

/s/ William C. Whitbeck

HOEKSTRA, P.J. (dissenting). I join the result reached in Judge WHITBECK'S dissenting opinion and its resolution of the issues addressed in parts I, II, and III. However, I express no opinion concerning the issue of retroactivity addressed in part IV because the record in this case is not fully developed in this regard and the issue was not fully briefed by the parties.

/s/ Joel P. Hoekstra

PHYLLIS R. CREGO v. KERMIT L. COLEMAN
No. 192798

COURT OF APPEALS OF MICHIGAN

226 Mich. App. 815; 573 N.W.2d 291; 1997 Mich. App. LEXIS418

November 14, 1997, Decided
November 26, 1997, Order Entered

Before: DOCTOROFF, P.J., and MACKENZIE and GRIFFIN, JJ.

The Court orders that a special panel shall be convened pursuant to MCR 7.215(H) to resolve the conflict between this case and *Crego v Coleman*, 201 Mich. App. 443; 506 N.W.2d 568 (1993).

The Court further orders that the opinion in this case released November 14, 1997, is hereby vacated.

The appellant may file a supplemental brief within 28 days of the Clerk's certification of this order. Appellee may file a supplemental brief within 21 days of service of appellant's brief. Nine copies must be filed with the Clerk of the Court. L.C. # 79-927194-DP.

CREGO v COLEMAN

Docket No. 192798. Released November 14, 1997, at 9:05 A.M.;

vacated November 26, 1997.

Before: DOCTOROFF, P.J., and MACKENZIE and GRIFFIN, JJ.

GRIFFIN, J. Defendant appeals by leave granted a circuit court order denying rehearing of an order granting plaintiff's motion for an increase in defendant's child support obligation. We reverse only because we are compelled to do so pursuant to MCR 7.215(H). Were we allowed, we would affirm and hold MCL 722.713; MSA 25.493 unconstitutional as violative of the equal protection guarantees of the United States and Michigan Constitutions.

I

The relevant facts are not in dispute and, except for the most recent developments, are set forth in our previous decision, *Crego v Coleman*, 201 Mich. App. 443; 506 N.W.2d 568 (1993). In October, 1978, plaintiff filed a paternity action alleging that defendant fathered her daughter, born in August, 1978.[1] In 1980, the trial court dismissed the complaint pursuant to a settlement agreement reached between the parties whereby defendant agreed to pay weekly child support but did not acknowledge paternity. The trial court's original order dated July 10, 1980, approved the terms of the settlement as required by MCL 722.713; MSA 25.493[2] of the Paternity Act and ordered defendant to pay

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[1]We acknowledge that the child has now reached the age of majority. However, the amount of support owed through her eighteenth birthday remains at issue. Further, this appeal involves questions of public significance that may recur and yet evade review. In re Rosebush, 195 Mich. App. 675, 678; 491 N.W.2d 633 (1992).

[2]Section 3 of the Paternity Act, MCL 722.713; MSA 25.493, provides:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have

$20 a week in child support until the friend of the court made its formal recommendation. Pending receipt of the recommendation, the trial court entered a second order on September 26, 1980, requiring defendant to pay $35 a week. This second order specified the parties' intent that the support order be "not modifiable" and that the matter "shall stand settled, discontinued and dismissed" as to defendant. After the recommendation was received, a final "permanent" order was entered on January 30, 1981, requiring defendant to pay $50 a week until the child was eighteen years old "or until further order of the court."

In the early 1990s, plaintiff filed a motion to modify the child support order but the trial court dismissed on the basis of res judicata. A divided panel of this Court affirmed holding that the parties' paternity settlement agreement was controlling and precluded a modification of defendant's support obligation.[3] The majority applied MCL 722.713(b); MSA 25.493 to the effect "that [the] statutory bar prevents modification of the support order unless the parties provide for modification in the language of their settlement agreement." Crego, supra at 447. In addition, the Crego majority rejected plaintiff's claim that MCL 722.713; MSA

> determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.

[3]Judge Griffin dissented on the basis that the language of the trial court's final order allows for modification. *Crego, supra* at 448. Accord *Van Laar v Rozema*, 94 Mich. App. 619, 623; 288 N.W.2d 667 (1980).

25.493 denies illegitimate children their constitutional right of equal protection of the law:

In *Hisaw [v Hayes*, 133 Mich. App. 639, 642; 350 N.W.2d 302 (1984)], this Court rejected the equal protection argument raised on behalf of an illegitimate child and recognized the binding effect of a settlement in a paternity matter. Declining to follow *Boyles v Brown*, 69 Mich. App. 480; 245 N.W.2d 100 (1976), and relying on MCL 722.713; MSA 25.493, this Court held:

> "The right of an illegitimate child to equal protection of law does not justify depriving the alleged father of the right to a trial of a disputed question of paternity. We decline to follow *Boyles*, supra, to the extent that, in a paternity settlement like that at issue here, it would permit a court to increase an alleged father's support obligation, albeit leaving him bound by his agreement to surrender his right to a judicial determination of paternity. Such a settlement cannot be modified, the only judicial remedy being rescission. [*Hisaw*, supra at 644-645.]"
>
> We believe *Hisaw* to be the better-reasoned opinion, and we choose to follow it. [Crego, supra at 446.]

Subsequently, in *Dones v Thomas*, 210 Mich. App. 674; 534 N.W.2d 221 (1995), a different panel of this Court declared MCL 722.713; MSA 25.493 unconstitutional as violative of the constitutional guarantees of equal protection because it authorizes nonmodifiable child support awards in paternity actions, while child support awards in divorce actions always remain modifiable. Based on this later

decision, plaintiff renewed her motion for modification of the support order seeking to compel defendant to provide medical insurance for her daughter. The circuit court concluded that it was required to follow *Dones*, the more recent decision, and granted plaintiff's motion.

II

On appeal, defendant argues that the lower court committed error requiring reversal by following *Dones* rather than this Court's prior and precedentially binding decision in *Crego*. We agree. Pursuant to MCR 7.215(H), the lower court and this Court must follow *Crego*, the first post-November 1, 1990, published opinion to render a holding on the issue. Therefore, *Crego* is the controlling precedent, and the lower court erred in following *Dones*. However, were we not bound by *Crego*, we would follow *Dones* and hold MCL 722.713; MSA 25.493 unconstitutional as violative of the equal protection guarantees of the United States and Michigan Constitutions. In doing so, we would join Illinois, Wisconsin, and the United States District Court for the Southern District of New York in declaring that state statutory schemes that bar modification of child support orders in paternity actions, but not in divorce actions, deny illegitimate children of equal protection of the law.

III

The Equal Protection Clauses of the United States and Michigan Constitutions provide that no person shall be denied equal protection of the law. U.S. Const, Am XIV; Const 1963, art 1, § 2; *Spada* v *Pauley*, 149 Mich. App. 196, 203; 385 N.W.2d 746 (1986). The constitutional guarantee requires that persons similarly situated be treated alike. *El Souri v Dep't of Social Services*, 429 Mich. 203, 207; 414

N.W.2d 679 (1987). While the clause restrains the use of governmental classifications generally, federal and state courts have specified that statutes that distinguish on the basis of certain "protected" classes such as race, alienage, gender, or legitimacy must be judged by stricter standards. See *Clark v Jeter*, 486 U.S. 456, 461; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988); *Lalli v Lalli*, 439 U.S. 259; 99 S. Ct. 518; 58 L. Ed. 2d 503 (1978); *Dep't of Civil Rights ex rel Forton v Waterford Twp*, 425 Mich. 173, 190; 387 N.W.2d 821 (1986); *Frame v Nehls*, 208 Mich. App. 412; 528 N.W.2d 773 (1995); *Spada, supra* at 203. Classifications based on illegitimacy are subjected to intermediate or "heightened scrutiny" and are unconstitutional unless "substantially related to permissible state interests." *Spada, supra* at 203. Pursuant to MCL 722.713; MSA 25.493, the parties in a paternity action may reach a settlement agreement that permanently bars illegitimate children from obtaining modification of child support to meet changing needs. In other words, the statute authorizes a putative father to waive a judicial determination of paternity in exchange for a permanent, unmodifiable support order, thus, forever precluding illegitimate children from obtaining additional support. MCL 722.713; MSA 25.493. In contrast, children of divorced couples may petition the court to modify a support award upon a showing of a change in circumstances. MCL 552.17(1); MSA 25.91(1).[4] Thus, unlike legitimate children, illegitimate children not subject to a filiation order may be foreclosed from future modification of child support, regardless of need.

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[4]We recognize that MCL 722.720; MSA 25.500 allows children born out of wedlock to, in some circumstances, petition the court for a change in support based on a change in circumstance. However, this provision applies only where there is an order of filiation and does not protect illegitimate children where the father has settled the paternity suit without acknowledging paternity.

IV

In our prior decision in this matter, this Court upheld as constitutional the statutory scheme at issue.[5] However, in the present appeal we conclude that *Crego* was wrongly decided for the reason that the unequal statutory treatment afforded based on illegitimacy cannot withstand heightened constitutional scrutiny.

In *Gerhardt v Estate of Moore*, 150 Wis 2d 563; 441 N.W.2d 734 (1989), the Wisconsin Supreme Court invalidated on equal protection grounds a similar statute. In *Gerhardt*, the Court rejected the rationale of *Crego* on the basis that the father's interest in a final settlement is "undercut by the countervailing state interest in the continued adequacy of support for the child." *Id.* at 573-574. The Wisconsin Supreme Court stated that "it is difficult to see how the interest in promoting settlements justifies a total waiver of future child support regardless of the child's future needs or the father's ability to pay." *Id.* at 573; accord *Williams v Lambert*, 902 F. Supp. 460 (1995). See also *Dep't of Public Aid v Miller*, 146 Ill. 2d 399, 405-410; 586 N.E.2d 1251, 166 Ill. Dec. 922 (1992) (agreeing with the reasoning in *Gerhardt, supra*).

Earlier in *Boyles v Brown*, 69 Mich. App. 480, 482-484; 245 N.W.2d 100 (1976), this Court employed similar reasoning in ruling on a predecessor statute:

> Relevant case law further belies the trial

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[5]The doctrine of law of the case issue was neither ruled on by the lower court nor briefed by the parties. Lawrence v Will Darrah & Associates, Inc, 445 Mich. 1, 4, n 2; 516 N.W.2d 43 (1994). We chose not to address it other than to note that the doctrine is discretionary and can give way when constitutional rights are implicated. Locricchio v Evening News Ass'n, 438 Mich. 84, 108-110; 476 N.W.2d 112 (1991).

court's belief that equality of treatment between legitimate and illegitimate children is contrary to public policy. In *Whybra v Gustafson*, 365 Mich. 396; 112 N.W.2d 503 (1961), our Supreme Court announced a public policy of this state to treat children born out of wedlock as no less deserving of support than those children born in wedlock. The Court stated that, "In terms of need for support and education, we see no difference between children born in and out of wedlock". *Id.* at 400. Although *Whybra* concerned itself with arbitrary classification in the context of ordering less support for illegitimate children in the original decree, we are satisfied that its rationale applies with equal force to the modification of support.

More recently, the United States Supreme Court, in *Gomez v Perez*, 409 U.S. 535; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973), found disparate statutory treatment between legitimate and illegitimate children to be constitutionally invalid. The Gomez decision held that the laws of Texas could not constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers while denying the same right to illegitimate children. In so holding, the Court reaffirmed earlier decisions which concluded that "a State may not invidiously discriminate against iilegitimate children by denying them substantial benefits accorded children generally". *Id.* at 538. See also, *Krause, Equal Protection for The Illegitimate*, 65 Mich. L Rev 477 (1967).

> Michigan has accorded a substantial benefit to children born in wedlock by providing for statutory procedures to modify support in divorce or separation cases. See MCLA 552.17; MSA 25.97; MCLA 552.252a; MSA 25.172(1) and MCLA 552.455; MSA 25.222(5). Although the paternity act provides no explicit procedure for modifying support provisions, its clear language, bolstered by judicial mandate, compels us to accord the same benefit to children born out of wedlock, viz., the right to petition the court for a change in support based on altered circumstances.

The *Boyles* panel relied in part on *Gomez v Perez*, 409 U.S. 535, 538; 93 S. Ct. 872; 35 L. Ed. 2d 56 (1973). In *Gomez*, the United States Supreme Court held that a state statute that granted legitimate children a judicially enforceable right of support from their natural fathers but denied the right to illegitimate children was unconstitutional as a violation of the guarantee of equal protection. In so ruling, the United States Supreme Court stated:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." *Weber v. Aetna Casualty & Surety Co,* [406

> US 164, 175; 92 S Ct 1400; 31 L Ed 2d 768 (1972).] [*Id.*]

Further, the United States Supreme Court recognized in *Gomez* that although the father's interests "cannot be lightly brushed aside, neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.* at 538. After *Gomez*, the United States Supreme Court has consistently followed the *Gomez* rationale by declaring as unconstitutional several state statutes that limited the time for establishing paternity. See *Clark, supra*; *Pickett v Brown*, 462 U.S. 1; 103 S. Ct. 2199; 76 L. Ed. 2d 372 (1983); *Mills v Habluetzel*, 456 U.S. 91; 102 S. Ct. 1549; 71 L. Ed. 2d 770 (1982). See also *Spada, supra*.

In regard to the present issue, this line of established authority was followed and adopted by the Wisconsin Supreme Court in *Gerhardt, supra* at 571-572:

> Similar to the procedural bars invalidated in the *Clark* line of cases, the lump-sum settlement provision[6] deprives certain nonmarital children the opportunity to obtain adequate support. Although *Clark* and the cases cited therein deal with statutory limitation bars to the filing of actions, the bar to seeking additional child support that results from a lump sum agreement works in precisely the same manner. Regardless of the

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[6]For the purposes of our analysis, we see no marketable difference between the lump-sum agreement involved in Gerhardt and the installment support arrangement defendant settled to in the present case. Each situation involves a fixed, unmodifiable amount that cannot be altered.

> label attached to the statutory bar, the result is the same. The nonmarital child, unlike the marital child, is barred from seeking additional support, regardless of need. That is hardly fair to the nonmarital child, much less constitutional.

See also *Williams, supra, and Dep't of Public Aid ex rel Cox, supra.*

V

We agree with the reasoning of the above authorities which conclude that an alleged putative father's interests in resolving issues of paternity and support are insufficient to justify discrimination based on illegitimacy. The state interests served by MCL 722.713; MSA 25.493, of securing a prompt and final settlement of these issues, are not sufficiently strong to overcome the permanent and potentially devastating effect that the settlement may have on the financial needs of illegitimate children. Indeed, legitimate and illegitimate children do not differ in their potential for encountering circumstances that may increase their need for financial support. See *Boyles, supra* at 483, quoting *Whybra v Gustafson*, 365 Mich. 396; 112 N.W.2d 503 (1961) ("[i]n terms of need for support and education we see no difference between children born in and out of wedlock").

Further, unlike in the past when the factual determination of paternity was often a difficult credibility contest, recent scientific test innovations now provide for a quicker, easier, and more accurate method for establishing paternity. See *Dones, supra* at 678-679; *Pickett, supra* at 11, quoting *Mills, supra* at 104, n 2 (O'CONNOR, J., concurring); *Dep't of Public Aid ex re; Cox, supra* at 407; *Gerhardt, supra* at 577. See, generally, *Clark, supra* at 465 ("increasingly

sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity.")

Accordingly, the state's interest in avoiding trial on the previously difficult and time-consuming issue of paternity no longer exists. For these reasons, after applying a heightened scrutiny test for equal protection, we conclude that a sufficient "substantially related" state interest does not exist to sustain the statute against the constitutional challenge.

VI

Accordingly, were we permitted to do so, we would affirm and hold MCL 722.713 ; MSA 25.493 of the Paternity Act unconstitutional as violative of the equal protection guarantees of the United States and Michigan Constitutions. Because our holding would in effect withdraw the bargained-for consideration defendant expected to receive for agreeing to waive a trial on the issue of paternity, we would give our holding only limited retroactive effect in that we would permit defendant and other similarly situated putative fathers to contest the issue of paternity. *Lindsey v Harper Hosp*, 455 Mich. 56, 67; 564 N.W.2d 861 (1997); *Tebo v Havlik*, 418 Mich. 350, 360-361; 343 N.W.2d 181 (1984). Defendants who chose not to contest paternity and all prospective defendants in paternity actions would be subject to the potential for modification of child support obligations for their illegitimate children.

Reversed.

/s/ Richard Allen Griffin

/s/ Martin M. Doctoroff

/s/ Barbara B. MacKenzie

PHYLLIS R. CREGO, a/k/a PHYLLIS SOCK, Plaintiff-Appellant,v. KERMIT COLEMAN, Defendant-Appellee.
Docket No. 139068

Court of Appeals of Michigan

201 Mich. App. 443; 506 N.W.2d 568; 1993 Mich. App. LEXIS 340

February 10, 1993, Submitted September 7, 1993, Decided

Before: HOLBROOK, JR., P. J., and GRIFFIN and REILLY, JJ.

REILLY, J. Plaintiff appeals as of right from a March 22, 1991, order dismissing, on the basis of res judicata, her motion for modification of a child support order.

Pursuant to a stipulation between the parties, the trial court by order dated July 10, 1980, dismissed plaintiff's paternity complaint after determining that adequate provision for support had been made. The trial court adopted the parties' agreement and ordered defendant to pay $20 a week until the friend of the court made its formal recommendation, and thereafter the recommended sum or $50 a week, whichever was less, until the child reached eighteen years of age.

On September 26, 1980, the trial court again determined that adequate provision for support had been made and, pursuant to the agreement of the parties, dismissed the cause

"as to the question of paternity only,"[1] and ordered defendant to pay $20 a week from July 10, 1980, to September 26, 1980, $35 a week thereafter until the friend of the court recommendation was received, and thereafter the amount of the recommendation or $50 a week, whichever was less, until the child reached eighteen years of age. The stipulation upon which the order was based stated "that it is the intent of the parties that the attached order is not modifiable," and "this matter shall stand settled, discontinued and dismissed against Kermit L. Coleman, defendant herein."

On January 30, 1981, after the friend of the court recommendation was submitted, the trial court entered a "permanent" order requiring defendant to pay $50 a week in support "commencing January 30, 1981, and continuing until said child attains the age of eighteen years or until further order of the court." Neither party nor their attorneys signed the order to approve its form or substance.

Although defendant could have consented to further modification of the settlement agreement to include the language "or until further order of the court," the record does not show that he did so.

Settlements are contracts and are governed by the legal principles applicable to contracts. *Hisaw v Hayes*, 133 Mich App 639, 642; 350 NW2d 302 (1984). In *Hisaw*, this Court rejected the equal protection argument raised on behalf of an illegitimate child and recognized the binding effect of a settlement in a paternity matter. Declining to follow *Boyles*

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[1]The phrase "as to the question of paternity only" was handwritten after the printed language "is hereby dismissed as to Kermit L. Coleman, defendant herein." There is nothing in the order that indicates who added the language, when or whether it was approved by the court.

v Brown, 69 Mich App 480; 245 NW2d 100 (1976), and relying on MCL 722.713; MSA 25.493, this Court held:

> The right of an illegitimate child to equal protection of law does not justify depriving the alleged father of the right to a trial of a disputed question of paternity. We decline to follow Boyles, supra, to the extent that in a paternity settlement like that at issue here, it would permit a court to increase an alleged father's support obligation, albeit leaving him bound by his agreement to surrender his right to a judicial determination of paternity. Such a settlement cannot be modified, the only judicial remedy being rescission. [Hisaw, supra at 644-645.]

We believe Hisaw to be the better-reasoned opinion, and we choose to follow it. Likewise, we believe that *Morrison v Richerson*, 198 Mich App 202; 497 NW2d 506 (1993), is distinguishable. In this case, defendant never acknowledged paternity. The trial court determined, in its order dismissing the case pursuant to the stipulation of the parties, that adequate provisions for support had been made. The second order, again pursuant to stipulation, authorized payment in accordance with the friend of the court recommendation. The stipulation stated that "the attached order is not modifiable" and "this matter shall stand settled, discontinued and dismissed" against defendant. The third order, entered after dismissal, was without consent of the parties and, we believe, was without effect beyond stating the amount recommended by the friend of the court, which change had been agreed to by the parties in their stipulation.

MCL 722.713; MSA 25.493 specifically provides that the performance of the agreement after approval by the court

bars "other remedies of the mother or child for the support and education of the child." That statutory bar prevents modification of the support order unless the parties provide for modification in the language of their settlement agreement.

Permission to modify has been found where the parties agreed that support should be paid "until the child reaches eighteen years of age or until further order of the court." *Van Laar v Rozema*, 94 Mich App 619; 288 NW2d 667 (1980). Although the language "until further order of the Court" was inserted in the order signed on January 30, 1981, nothing in the record suggests that phrase was agreed to by defendant, and plaintiff does not make that claim. The trial court had no authority to modify the parties' agreement by entering a support order that was inconsistent with the parties' settlement of the paternity action that had previously been approved by the court. MCL 722.713; MSA 25.493; *Hisaw, supra*. We conclude, therefore, that the phrase "or until further order of the court" in this case could not change the agreement made by the parties, and does not authorize later modification by the court.

The order of the trial court dismissing plaintiff's motion for modification is affirmed, although for reasons other than those stated by the trial court. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Affirmed.

HOLBROOK, JR., P.J. concurred.

GRIFFIN, J. (dissenting). I respectfully dissent. I would reverse
on narrow grounds. At issue in this appeal is a 1981 circuit court order that specifically provides for modification by

using the language "until further order of the court." Although defendant now contends that he never agreed to the language allowing for modification, there was no objection to the order when it was entered in 1981 and defendant never appealed.

An agreement to provide support for a child born out of wedlock requires approval by the court, MCL 722.713(a); MSA 25.493(a), and it is well settled that a court speaks only through its written orders. *Tiedman v Tiedman*, 400 Mich 571, 576-577; 255 NW2d 632 (1977). Moreover, a judgment entered by consent is not a contract; rather, it has the same force and effect as a litigated judgment. *Trendell v Solomon*, 178 Mich App 365, 369; 443 NW2d 509 (1989). Because the order in this case allows for modification, the court was not barred from entertaining plaintiff's request for an increase in support. Compare *Morrison v Richerson*, 198 Mich App 202, 209-211; 497 NW2d 506 (1993).

STATE OF MICHIGAN

IN THE THIRD JUDICIAL CIRCUIT COURT

WAYNE COUNTY

PHYLLIS R. CREGO *now* SOCK,

Plaintiff, Case No. 79-927194-DP
v. Hon. Marianne O. Battani

KERMIT L. COLEMAN,

Defendant.
_____/

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ORDER GRANTING PLAINTIFF'S VERIFIED PETITION FOR MODIFICATION OF ORDER OF SUPPORT RE: INCREASE OF SUPPORT AND PAYMENT OF MEDICAL, DENTAL OPTICAL, PRESCRIPTION AND HOSPITALIZATION EXPENSES

_____/

At a session of the Third Judicial Circuit Court, held in the City-County Building, Two Woodward Avenue, Detroit, Michigan 48226 on September 12, 1995

PRESENT: HON. MARIANNE O. BATTANI

Plaintiff, PHYLLIS R. CREGO *now* SOCK, having filed Plaintiff's Verified Petition for Modification of Order of Support and Payment of Medical, Dental, Optical, Prescription and Hospitalization Expenses against Defendant, KERMIT L. COLEMAN, and Defendant having filed a response thereto, and the parties through counsel having appeared and argued before the Court, and the Court being otherwise duly advised in the premises, makes this disposition:

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Petition for Modification of the Order of Support entered by the Court on 30 January 1991 is hereby granted.

IT IS FURTHER ORDERED that this case shall be referred to the Wayne County Friend of the Court for an investigation and recommendation as to the issues of support and payment of medical, dental, optical, prescription and hospitalization expenses.

IT IS FURTHER ORDERED that Defendant, KERMIT L. COLEMAN, shall forwith [sic] cause the minor child, Angela M. Crego, to be insured under Defendant's major medical and hospitalization coverage, and shall provide to said minor child, in care of Plaintiff's attorneys, a membership card or other proof of coverage.

IT IS SO ORDERED.

/s/ Marianne O. Battani
CIRCUIT COURT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

C. A. NO. 79-927194-DP

PHYLLIS R. CREGO
Complainant

vs. **ORDER ~~OF FILIATION~~**

KERMIT L. COLEMAN
Defendant.

At a session of said Court held in the Courtroom in the City-County Building in the City of Detroit on: JAN 30 1981

PRESENT: HONORABLE HAROLD HOOD

This cause appears before the Court for the entry of a permanent ~~Filiation~~ Order, a complaint having been duly filed and the Friend of the Court having submitted a report and recommendation thereon and both parties having been advised thereof and the defendant having been adjudged in manner and form as appears by the record thereof, THEREFORE:

IT IS ORDERED that the defendant pay to the office of the Friend of the Court, 600 Randolph Street; Detroit, Michigan 48226 the sum of $50.00 per week for the support of ANGELA M. CREGO born 8/16/78 minor child of the parties hereto commencing January 30, 1981 and continuing until said child attains the age of 18 years or until further order of the Court.

IT IS FURTHER ORDERED that the defendant pay to the

Office of the Friend of the Court, 600 Randolph Street, Detroit, Michigan 48226, the confinement expenses incurred in the birth of said child, payable at the rate of $3.00 per week commencing as soon as the Friend of the Court has determined the amount due and has notified the defendant.

IT IS FURTHER ORDERED that the defendant be ordered to pay forthwith any arrearage now owing under the Temporary Order of Filiation dated September 26, 1980 and the balance of said Order to remain in full force and effect.

IT IS FURTHER ORDERED that any monies held by the Friend of the Court under the Interim Order be applied against support.

IT IS FURTHER ORDERED that the defendant pay to the office of the Friend of the Court, the sum of $1.50 per month, payable semi-annually in advance of January 2nd and July 2nd hereafter while the order for support is operative. Initial payment for months preceding next regular due date shall be made forthwith.

/s/ Harold Hood
Circuit Judge

JEANNE MARIE STURAK, a/k/a JEANNE MARIE PUNSCHKE,
Plaintiff-Appellee, v ODEZI OSIONI OZOMARO,
Defendant-Appellant.

No. 207331

COURT OF APPEALS OF MICHIGAN

238 Mich. App. 549;606 N.W.2d 411 (1999) Mich. App. LEXIS 306

November 16, 1999, Decided

Before: GAGE, P.J., and WHITE and MARKEY, JJ.

GAGE, J. Defendant appeals as of right the trial court's order setting aside a 1985 settlement agreement and entering a default judgment declaring his paternity of plaintiff's son. We affirm.

I

FACTS AND PROCEEDINGS

In June 1983, plaintiff filed a complaint in Kalamazoo Circuit Court alleging that defendant was the father of her minor child, A.S.P, born May 17, 1983. The court ordered that the parties and child submit to blood tests to determine the child's paternity. The parties did submit to blood testing, and subsequently entered an agreement that required defendant to pay plaintiff $3500 "in complete and full settlement of any claim that the plaintiff may have against the defendant for the cost of confinement, or the maintenance, support and education of" the child. The agreement specifically provided that defendant did not

acknowledge paternity. In February 1985, the circuit court approved the settlement agreement. Defendant ultimately satisfied his end of the bargain, and the court in March of 1991 ordered the revocation of an income withholding order that had been entered against defendant.

In September 1996, in the wake of this Court's decision in *Dones v Thomas, 210 Mich. App. 674; 534 N.W.2d 221 (1995),* which held that the statutory provision governing settlement agreements in paternity actions was unconstitutional and invalid, plaintiff moved to modify the parties' 1985 settlement agreement. Relying on *Dones*, the circuit court set aside the 1985 agreement and again ordered that the parties and the minor submit to paternity blood testing.[1] Defendant then moved that the court reverse its order setting aside the 1985 settlement agreement, arguing that the court should not apply *Dones* retroactively. The court denied defendant's motion, and reordered blood tests.[2] After defendant failed to comply with the court's order requiring blood tests, plaintiff moved for and the court granted a default judgment of paternity against defendant pursuant to

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[1] Although the court's order does not specifically mandate DNA testing, the court explained on the record at a July 18, 1997 hearing that DNA testing would benefit all the interested parties:

> In this case there is a new technology that is available since the prior blood test; namely, DNA testing. The availability of newer technology benefits all parties so as to increase the certainty of the outcome of the testing, not just the child, not just the plaintiff, but also the defendant. Therefore, it is logical and appropriate that there be another blood test ordered.

[2] The court also denied defendant's motion to order that two other men with whom plaintiff admitted having had sex in 1982 also submit to blood testing.

MCL 722.716(1)(a); MSA 25.496(1)(a). The court subsequently entered a default order of filiation requiring that defendant, among other obligations, pay child support of $93 per week commencing on July 18, 1997, without credit for the $3500 defendant had paid pursuant to the parties' 1985 settlement agreement.

The parties entered their 1985 settlement agreement, the continuing validity of which represents the core of their instant dispute, pursuant to former § 3 of the Paternity Act, MCL 722.711 et seq.; MSA 25.491 et seq. Section 3 provided as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child. [MCL 722.713; MSA 25.493.]

This Court has adopted different stances regarding the validity of § 3, and has only recently definitively resolved this question. An examination of the history of this Court's treatment of § 3 is necessary to our informed resolution of the parties instant dispute.

II

ANALYSIS AND TREATMENT OF § 3 OF PATERNITY ACT

In *Crego v Coleman,* 201 Mich. App. 443; 506 N.W.2d 568 (1993) (Crego I), the plaintiff sought modification of a settlement agreement she and the defendant had entered under § 3. *Crego I,* 201 Mich. App. at 444-445. The parties' agreement did not acknowledge the defendant's paternity, and explained that "'it is the intent of the parties that the attached order is not modifiable.'" *Id. at 445.* The trial court dismissed the plaintiff's action on the basis of res judicata. *Id. at 444.* This Court rejected the proposition that the binding effect of a settlement in a paternity action denied the illegitimate child his constitutional equal protection rights, reasoning that the illegitimate child's equal protection rights did not justify increasing an alleged father's support obligation, while leaving him bound by his agreement to surrender his right to a judicial determination of paternity. *Id. at 446,* quoting *Hisaw v Hayes,* 133 Mich. App. 639, 642; 350 N.W.2d 302 (1984). This Court concluded that because subsection 3(b) specifically provided that performance of a settlement agreement after court approval barred "other remedies of the mother or child for the support and education of the child," the parties were precluded from seeking modification of their agreement absent language within the agreement itself specifically providing for modification. *Crego I, supra* at 447.

This Court again addressed the constitutionality of § 3 in *Dones v Thomas,* 210 Mich. App. 674; 534 N.W.2d 221 (1995). The plaintiff minor, through his next friend, sought modification of a paternity settlement agreement entered by his parents. The defendant had acknowledged paternity and

agreed to provide the plaintiff certain sums of money. The plaintiff argued that his right to support could not have been compromised in this settlement, but the trial court granted the defendant summary disposition. On appeal, this Court noted the distinction that while the Paternity Act specifically provides that parties may reach a settlement that bars future recovery or modification of support, the divorce statutes specifically conferred on the court having jurisdiction the power to modify support awards on a showing of a change in circumstance.[3] *Dones, supra* at 675-676. The Court reasoned that, under the intermediate-level scrutiny with which illegitimacy classifications are examined, this statutory scheme that treated legitimate and illegitimate children differently did not substantially relate to an important state interest. *Id.* at 677. While the defendant contended that § 3 promoted settlement and finality in paternity proceedings, the Court noted that, in light of recent scientific advances in establishing paternity, the need to settle paternity proceedings had diminished because the danger of inaccurate determinations had been minimized. *Id.* at 678-679. The Court concluded that § 3 was unconstitutional because the need for paternity claim settlement was now the same as the need for settlement of a paternity/support question in a divorce proceeding:

> [B]ecause the Legislature has determined in the context of divorce proceedings that the need to allow a modification of child support upon a change in circumstance outweighs the need for settlement and finality, the same

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[3] The Court cited MCL 552.17(*1*); MSA 25.97(1), which states that the court may, from time to time after its issuance, on the petition of either of the parents, revise and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children, as the circumstances of the parents, and the benefit of the children require.

> conclusion must be applied to paternity actions.
>
> . . . [Section 3] is unconstitutional because it violates equal protection to the extent that it affords the parties to a paternity action greater settlement rights than are afforded parties to a divorce action with respect to the child support issue and to the extent that it renders child support awards under the Paternity Act unmodifiable while child support awards under the divorce statutes remain modifiable. [*Id.* at 679.*]*

Accordingly, the Court remanded the plaintiff's claim for modification to the trial court. *Id.* at 680. The *Dones* Court failed to address the prior *Crego I* Court's decision to the contrary.

Following this Court's *Dones* decision, the Legislature repealed § 3, effective June 1, 1997, noting that this Court had found § 3 unconstitutional. 1996 PA 308; Senate Fiscal Agency Bill Analysis, SB 604, June 24, 1996. Also following *Dones*, the plaintiff from *Crego I* refiled her suit seeking modification of the settlement agreement she had entered pursuant to § 3. The circuit court granted plaintiff's motion for modification, concluding that it was bound to follow *Dones*, the most recent decision addressing the constitutionality of § 3. The defendant appealed. *Crego v. Coleman,* 226 Mich App 815, 817; 573 NW2d 291 (1997) (*Crego II*). Although the *Crego II* Court indicated its agreement with the *Dones* Court's analysis and conclusion, it reversed the circuit court's orders on the basis that, pursuant to MCR 7.215(H)(1), both this Court and the circuit court were required to follow *Crego I*, the first post-1990 November 1, 1990, published opinion ruling on the

constitutionality of § 3. *Crego II, supra.*

A conflict panel of this Court was subsequently convened to resolve the disagreement between the *Crego I* and *Crego II* decisions, and the *Crego II* decisions, and the *Crego II* opinion was vacated. MCR 7.215(H). In *Crego v Coleman, 232 Mich. App. 284; 591 N.W.2d 277 (1998) (Crego III)*, the majority agreed with the analysis of the *Crego II* Court that determined § 3 unconstitutionally violated equal protection guarantees. *Crego III, supra* at 288. The *Crego III* Court reiterated that while all children have an inherent right to parental support, § 3 denied children born outside marriage who are not the subject of a filiation order the right to seek modification of support orders, a right expressly granted to other children. *Crego III, supra.* at 290-292. In light of "'the announced public policy of this state . . . to treat children born out of wedlock as no less deserving of support than those born in wedlock,'" *id.* at 294, quoting *Smith v. Robbins,* 91 Mich App 284, 289; 283 NW2d 725 (1979), the *Crego III* Court found no difference between the state's interest in settlement and finality in divorce proceedings and those same interests in actions under the Paternity Act that would justify treating children born outside marriage differently than children generally.[4] *Crego III, supra* at 294-295. Therefore, the Court concluded that § 3 was not substantially related to the achievement of any important governmental objective. *Crego III, supra* at 293-295.

Having reviewed the pertinent legal history concerning § 3, we may now proceed to address the parties' arguments

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[4] Like the Dones and Crego II Courts, the Crego III Court noted that the factual determination of paternity is no longer a difficult credibility contest given scientific advances in DNA testing that provide a more convenient and more accurate method for establishing paternity. *232 Mich. App. at 296.*

on appeal.

III

Defendant first contends that the trial court erred in relying on *Dones*, *supra* as the basis for setting aside the parties' 1985 settlement agreement.[5] The trial court granted plaintiff's

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[5]Plaintiff claims that defendant has failed to preserve for our review the issue whether *Dones or Crego I* represented the controlling precedent because defendant failed to raise any argument to this effect before the trial court. While plaintiff correctly notes that defendant failed to specifically argue before the trial court that *Crego I* should control the trial court's decision, we may nonetheless consider defendant's argument because it raises a question of law, and any facts necessary to a proper resolution of this issue have been presented. *Poch v Anderson, 229* Mich. App. 40, 52; 580 N.W.2d 456 (1998).

Plaintiff also maintains that this Court has no jurisdiction to address defendant's arguments concerning the propriety of the trial court's decision to set aside the parties' 1985 settlement agreement because defendant failed to timely file his claim of appeal. According to plaintiff, the trial court's August 1, 1997 order denying defendant's motion to set aside the court's September 1, 1996 order setting aside the 1985 settlement agreement constituted a final order with respect to any issues involving the validity of the parties' settlement agreement, and MCR 7.203(A)(1) and 7.204(A)(1) therefore required that defendant file his claim of appeal within twenty-one days of August 1, 1997. Defendant filed the instant claim of appeal on November 4, 1997. Plaintiff's argument, however, misapprehends the concept of a "final order" or "final judgment." A final judgment or order in a civil case means "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." *Baitinger v Brisson, 230 Mich. App. 112, 116; 583 N.W.2d 481 (1998),* quoting MCR 7.202(8)(a)(i). The trial court's order setting aside the parties' 1985 settlement agreement did not represent a final order or judgment because it left unresolved the parties' rights and liabilities. The issues arising from the trial court's order setting aside the prior settlement agreement could properly be appealed as of right only on entry of the trial court's final order, which occurred on November 3, 1997, when the court established

motion to set aside the settlement agreement on September 3, 1996. At that point in time, § 3 was still in effect, and *Crego I* and *Dones* stood in unreconciled contradiction. The point is insignificant, however, given that *Crego III* has overruled *Crego I* and held that § 3 was unconstitutional, thus nullifying the precedent defendant argues should have controlled. Therefore, the ultimate question becomes whether this Court's holding in *Crego III* may be retroactively applied.

IV

Defendant next argues that this Court's decision in *Dones* should not be applied retroactively. *Crego III* was released after defendant had filed this appeal, and therefore fails to appear within either party's brief on appeal. Because the reasoning and holdings of *Dones* and *Crego III* are essentially the same, however, we will simply extend the parties' arguments regarding *Dones* to address the *Crego III* decision. The retroactive effect of this Court's *Crego III* decision is a question of law, which this Court reviews de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n,* 456 Mich. 590, 610; 575 N.W.2d 751 (1998).

We begin our analysis by restating the well-settled general rule that unconstitutional statutes are void ab initio. In *Stanton v Lloyd Hammond Produce Farms,* 400 Mich. 135; 253 N.W.2d 114 (1977), our Supreme Court explained this proposition as follows:

" The general rule is that an unconstitutional

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defendant's specific support obligations. Therefore, defendant timely filed his claim of appeal on November 4, 1997, and we have jurisdiction to address his arguments.

> statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed." [*Id.* at 144-145, quoting 16 Am Jur 2d, Constitutional Law, § 177, pp 402-403.]

The unconstitutional statute "leaves the question that it purports to settle just as it would be had the statute not been enacted." 16A Am Jur 2d, Constitutional Law, § 203, p 90.

Another general rule is that judicial decisions are to be given full retroactive effect. *Michigan Educational Employees Mut Ins Co v. Morris,* 460 Mich. 180, 190; 596 N.W.2d 142, 147 (1999); *Lindsey v Harper Hospital,* 455 Mich. 56, 68; 564 N.W.2d 861 (1997). As the Court in *Stanton, supra* at 147, also recognized, however, judicial decisions finding statutes unconstitutional will not be applied retroactively without concern for justice and equitable treatment. Where injustice might result from full retroactivity, courts have adopted a more flexible approach, giving holdings limited retroactive or prospective effect. *Lindsey, supra.* In deciding to what extent to retroactively apply a changed legal interpretation of a statute, we must consider the following elements: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Morris, supra at* 190; *Lincoln v General Motors Corp,* 231 Mich. App. 262, 268; 586 N.W.2d 241 (1998); *Jahner v Dep't of Corrections,* 197 Mich. App. 111, 114; 495 N.W.2d 168 (1992). We may also incorporate into our analysis any other facts or considerations relevant to the instant dispute

that may affect the fairness of our determination. *Stanton, supra* at 147. See also *Morris, supra* at 190 ("resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy") (citation omitted); *Sellers v Hauch,* 183 Mich. App. 1, 11-12; 454 N.W.2d 150 (1990) (The overriding goals in determining whether to retroactively apply a new rule of law are to effectuate fairness and public policy.). No specific factor will control, nor will any particular result necessarily prevail from decision to decision.

> "It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result."
>
> The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law. . . . Without the flexibility to so apply the decision, it would be unlikely that much needed change could be effectuated in this state. [*Placek v City of Sterling Heights,* 405 Mich. 638, 665; 275 N.W.2d 511 (1979)]

In applying these considerations to the instant case, we first examine the purpose of the new rule announced in

Crego III. The *Crego III* Court, which convened to settle the conflicting reasoning of the *Crego I* and *Crego II* (and by implication the Dones) decisions, clearly intended to remove the statutory bar preventing illegitimate children not subject to an order of filiation from potentially modifying purportedly final § 3 support agreements, *Crego III, supra* at 291-292, thus securing for these illegitimate children the same rights to parental support as legitimate children receiving support under divorce settlement agreements. *Id.* at 294-295.

> Children born outside marriage are no less deserving of support because of the circumstances of their birth than other children. If there is no limitation on the right of a legitimate child to seek modification of support, then there can be no such limitation on the same right for a child born outside marriage. [*Id.* at 296.*]*

Our determination to apply *Crego III* as fully retroactive would best enable achievement of this purpose.

We next consider the extent to which defendant may have behaved in reliance on the unconstitutional § 3. Defendant maintains generally that pursuant to the parties' 1985 agreement, he possessed a vested contractual right with which a subsequent court decision should not interfere. Although defendant fails to explain specifically what concrete, vested right he obtained pursuant to the parties' agreement, we acknowledge that the existence of potentially affected vested rights is a legitimate consideration that may weigh against retroactively applying a decision or statute. Placek, supra at 665; *Martin v White Pine Copper Co,* 378 Mich. 39, 44; 142 N.W.2d 681 (1966)*; Donohue v Russell,* 264 Mich. 217, 219; 249 N.W. 830 (1933). While defendant

also argues that he would have made different financial decisions over the past several years if he had known the parties' 1985 settlement agreement was subject to modification, and that in reliance on the settlement agreement he broke all emotional bonds with the minor, he offers no evidence of any specific examples of his alleged reliance in either the record or in his brief on appeal. In any event, as discussed below, defendant's claims of financial reliance on the old settlement agreement are insufficient to outweigh his son's right to financial support.

Next requiring analysis is the question whether retroactive application of *Crego III* would adversely affect the administration of justice. Defendant suggests only that the full retroactive application of *Dones* and *Crego III* would cause chaos in the judicial system. Because defendant lacked the benefit of the decision in *Crego III* when he filed his brief on appeal, we will also consider on his behalf the *Crego III* dissent's contentions regarding retroactivity. The dissent first noted that literally thousands of cases must have been initiated under § 3 since its 1956 enactment. *Crego III, supra* at 327. The dissent feared that the majority's decision would permit putative fathers to independently commence actions to revisit settlement agreements in attempts to disprove their paternity. *Id.* at 328, n. 26. The dissent speculated with apparent trepidation that, "if the putative father, using modern DNA testing methods, is now 'cleared' of paternity[,] [w]ill such an individual be able to obtain reimbursement of the total amount of child support he paid for a child born outside marriage from the mother of that child?" *Id.* at 328. According to the dissent, this type of restitution could impose on the mother a tremendous financial hardship. *Id.* Finally, the dissent wondered whether, "[i]f in a significant number of these cases the men involved are now able to disprove paternity and renounce those agreements, will the children born outside marriage be

henceforward deprived of any 'parental' child payments whatsoever?" *Id.* at 329.

While we admittedly may not predict with certainty the actions of different parties to settlement agreements that must have been entered under vastly differing circumstances, a retroactive application of the *Crego III* decision would not necessarily facilitate any of these imagined developments. We initially note that children generally lose their entitlement to parental support at the age of eighteen, MCL 722.1(a), 722.3; MSA 25.244(1)(a), 25.244(3); MCR 3.211(E)(2), or perhaps at the age of nineteen years and six months. MCL 722.3a; MSA 25.244(3a). Therefore, because it is the minor child's right to and need for support primarily at issue and because a completely retroactive application of *Crego III* to every nonmodifiable § 3 support agreement entered since the enactment of § 3 in 1956 would likely adversely affect the administration of justice, we would limit the retroactive application of *Crego III* to settlement agreements entered before the Legislature's repeal of § 3, effective June 1, 1997, the subjects of which have not yet reached the age at which their right to parental support terminates.

As a practical matter, the potential litigation is further limited to situations where the potential litigant is dissatisfied with the agreement's support provisions, has knowledge of the putative father's continued existence and location, and believes that seeking modification of the agreement would constitute a worthwhile endeavor. Presumably some potential litigants appreciate the finality their settlement agreements have provided and would have no desire to reinitiate contact with the putative father. We may reasonably assume that many cases also exist involving putative fathers without savings and with little earnings potential, and that therefore no incentive to revisit the previously entered settlement agreement would exist. In sum, while retroactive application

of *Crego III* would remove a legal obstacle preventing revisitation of this discrete class of settlement agreements, we find it likely that various practical realities would discourage relitigation of all these potentially modifiable agreements.

Regarding the *Crego III* dissent's concerns with respect to putative fathers seeking to reopen settlement agreements in attempts to disprove paternity, it does not ineluctably follow from *Crego III* or our decision today that putative fathers have that right. We express no opinion on that issue and leave it to a case raising the question.

As the final consideration in our retroactivity analysis, we must not forget that the illegitimate child's right to support is primarily at issue. *Crego III, supra* at 294, n 5. In *Evink v Evink*, 214 Mich. App. 172, 175-176; 542 N.W.2d 328 (1995), we held that

> [a] child has an inherent right to parental support. . . . As this Court has stated, the purpose of child support is to meet the needs of the child, and the parents may not bargain away a child's right to receive adequate support. . . .
>
> To accept defendant's position would be to allow a parent to voluntarily release parental rights in order to escape the child support obligation where the child remains in the custody of the other biological parent. Such a result is not supported by statute, case law, or sound public policy. We hold that in the absence of a clear legislative directive stating otherwise, where a biological parent voluntarily releases parental rights to the

> children and custody remains with the other biological parent, the termination of parental rights does not terminate the parent's obligation to support the child.

See also *Crego III, supra* at 290 (citing *Evink* for the proposition that children have an inherent right to parental support). Only a child's adoption relieves the child's natural parents from their obligation to support the child. *Evink, supra* at 174. Furthermore, as the Court recognized in *Crego III, supra* at 295, illegitimate children have the same needs for support as other children. *Smith, supra.* As this Court concluded in *Crego III, supra* at 296-297, *Crego II, supra* at 818-821, and *Dones, supra* at 676-679, denying plaintiff's son the opportunity to seek additional support constituted a denial of equal protection. See *Stanton, supra* at 146-148 (The Supreme Court in *Stanton* retroactively applied a court decision holding unconstitutional a statutory provision that prevented certain agricultural employees from receiving worker's compensation, on the basis that it denied these employees equal protection, and despite the defendants' arguments that they had relied financially on the unconstitutional statute.). We also acknowledge the state's interest in providing for the support and care of illegitimate children, *Crego III, supra* at 294, which interest is reflected in the announced public policy of this state to treat children born out of wedlock as no less deserving of support than those born in wedlock. *Smith, supra* at 289. Although defendant enjoys a vested contractual right that formed under § 3, as a matter of public policy, the overriding interest of the illegitimate child must prevail when defendant's contractual right conflicts with the child's right to support, especially when the child's right to support is considered in conjunction with the state's interest in providing for these children. As the trial court in this case astutely observed,

Because really what's at issue here, it seems to me, is a constitutional right of the child as much as it is the constitutional rights of the parents and we can't lose sight of that fact. It's a child who is - who has apparently, I believe, been unrepresented throughout all of these proceedings, including even right now.

So I think it's even more incumbent upon us to recognize that the rights of the child are at issue here and must be balanced. And you've got constitutional rights. The *Dones* case is based on equal protection, which basically found that the child was denied equal protection under the paternity law that the *Dones* case overturned.

And so what we are talking about here is a child's right to be supported and to have equal protection to support that has to be balanced against the rights of the defendant.

. . . I think it's important to look at the first of the factors, that is the purpose of the new rule, very carefully. And I'm satisfied that it weighs heavily in favor of the decision that I am giving, and that is as the purpose of this rule is to assure equal protection for children. And balancing that right against the defendant's right to due process, I believe . . . the child has to be protected. And that purpose has to weigh heavily in favor of protecting the child.

Defendant next argues that the trial court applied the wrong law when it entered a default judgment of paternity for defendant's failure to obey the court's order for blood tests. The determination whether a statutory provision applies to a given action is purely a legal question that this Court reviews de novo. *Auto Club Ins Ass'n v State Farm Ins Cos,* 221 Mich. App. 154, 169; 561 N.W.2d 445 (1997).

Plaintiff initially filed her paternity action in 1983. At that time, subsection 6(a) of the Paternity Act, MCL 722.716(a); MSA 25.496(a) provided as follows:

> "If the court orders any blood or tissue typing test to be taken and any party refuses to submit to the test, in addition to any other remedies available, the fact of the refusal shall be disclosed at the trial unless good cause is shown for not disclosing the fact of refusal." [*Bowerman v MacDonald,* 431 Mich. 1, 22-23; 427 N.W.2d 477 (1988).*]*

In *Bowerman*, the Supreme Court concluded that a default judgment in favor of a plaintiff mother in a paternity case could not be entered as a sanction for the defendant's refusal to submit to a blood test. Id. at 3-4, 22-24. Defendant's argument that the trial court should have applied this law ignores that by the time the trial court set aside the parties' 1985 settlement agreement and ordered blood tests (in 1996 and 1997), and at the time of defendant's subsequent refusals to comply, the Legislature had amended subsection 6(a), now 6(1), to specifically permit a trial court to enter a default for defendant's refusal. Subection 6(1) currently provides in relevant part as follows:

> If the court orders a blood or tissue typing or DNA profile determination to be conducted

> and a party refuses to submit to the typing or DNA profile determination, in addition to any other remedies available, the court may do either of the following:
>
> (a) Enter a default judgment at the request of the appropriate party.
>
> (b) If a trial is held, allow the disclosure of the fact of the refusal unless good cause is shown for not disclosing the fact of refusal. [MCL 722.716(1); MSA 25.496(1).]

Because the statute in effect at the time defendant disobeyed the trial court's order specifically contemplated the trial court's entry of a default against him, defendant's argument that the trial court improperly applied subsection 6(1) retroactively is without merit.

VI

Lastly, defendant asserts that the trial court erred in imposing the harshest of sanctions for his failure to comply with the blood test order. We review the trial court's discretionary decision whether to enter a default judgment for an abuse of that discretion.

In reviewing a trial court's discretionary entry of a default judgment, this Court has considered the following factors:

> [W]hether the [party's] failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice

> to the party requesting default, and whether willfulness has been shown. [*Traxler v Ford Motor Co,* 227 Mich. App. 276, 286; 576 N.W.2d 398 (1998) (citation omitted).]

Applying this set of standards to the instant case weighs against defendant's argument that the default judgment was improper. While defendant argues that the length of time between the trial court's ordering of the blood tests and its entry of the default judgment (August 1, 1997 through September 29, 1997) was relatively short, presumably to show that he had not stalled discovery for an extended period of time and that not much time had elapsed between his violation of the court's order and plaintiff's motion for default, we note that defendant apparently twice disobeyed the court's orders for blood tests. On September 18, 1996, the court ordered that defendant appear for testing on October 9, 1996, at a specified place and time. Defendant never appeared, and did not move to set aside the court's order for blood tests until June 4, 1997. After the court denied defendant's motion and on August 1, 1997 ordered that defendant appear for testing on August 13, 1997, defendant again ignored the court's order. Given these circumstances, a significant amount of time elapsed during which defendant failed to respond to the court's orders, and plaintiff's August 18, 1997 motion for default was not premature. With respect to the prejudice to plaintiff that resulted from defendant's refusals to comply with the court orders, we note that defendant's refusals denied plaintiff access to potentially the most probative evidence obtainable of defendant's paternity of the child. Regarding the nature of defendant's failure to comply, defendant's refusals were blatantly willful. Defendant was unquestionably aware of the consequences of refusing to submit to blood testing, having been forewarned by the trial court at the July 18, 1997 hearing on defendant's motions to set aside the court's previous orders that "[i]f that

blood test is not taken, the consequences provided for in the statute would, of course, result." Furthermore, at the September 29, 1997 hearing on plaintiff's motion for default judgment, defendant showed no indication that he would ever submit to the blood tests. Accordingly, we cannot conclude that the trial court abused its discretion in entering a default judgment of paternity against defendant.

Defendant, an African-American, maintains, however, that he should nonetheless remain free to ignore the court's blood testing orders because plaintiff had sexual intercourse with two other African-American men before her biracial son's birth. According to defendant, in light of the fact that MCL 722.716(5); MSA 25.496(5) contemplates that more than one person may have a paternity probability of ninety-nine percent or above, his refusal to comply with the court's blood test orders did not represent willful behavior because he "had to protect his right against the presumption of paternity when he was only one of at least three possible men who could have been the father of the child in the present matter." Defendant moved before the trial court for an order requiring that these two men also appear for blood tests, and the trial court denied this motion. We fail to understand, however, the extent to which defendant's concerns are relevant to our determination whether defendant should have obeyed the trial court's orders. Defendant cites no authority for his position that the trial court's failure to order the additional tests excuses his twice ignoring the trial court's orders to submit himself for testing, or for the proposition that the trial court erred in denying his motion to order the testing of other men. Defendant should have submitted himself for testing, and sought rehearing of or appealed the trial court's denial of his motion to have the other men tested. However, defendant has chosen not to appeal that order, electing instead to attempt to utilize it as a basis for overturning the default judgment. Defendant's argument does

not affect our conclusion that the trial court properly entered a default judgment against defendant.

VII

In summary, our decision regarding retroactivity generally applies to illegitimate minor children not subject to orders of filiation who are parties to purportedly nonmodifiable § 3 settlement agreements, permitting these minors to seek modification of their settlement agreements. Our decision does not apply to individuals who no longer are entitled to parental support. MCL 722.1(a), 722.3; MSA 25.244(1)(a), 25.244(3); MCR 3.211(E)(2).

In this specific case, we reject defendant's various assertions that the trial court erred in setting aside the parties' § 3 settlement agreement, and we conclude that the court properly entered a default judgment of paternity against defendant.

Affirmed.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey

MARC E. T. DONES, by his Next Friend, KATHIE DONES -CARSON, Plaintiff-Appellant, v. ISIAH THOMAS, Defendant-Appellee.
No. 161042

COURT OF APPEALS OF MICHIGAN

210 Mich. App. 674; 534 N.W.2d 221; 1995 Mich. App. LEXIS213

November 10, 1994, Submitted
May 19, 1995, Decided

Before: CONNOR, P.J., and SAWYER and G.R. CORSIGLIA, JJ.

SAWYER, J. Plaintiff appeals from an order of the circuit court granting summary disposition for defendant in this paternity and support action. We reverse.

Plaintiff, appearing through his next friend and aunt, claims that defendant, a sports figure of some renown, is his father. This paternity claim originally was brought at the time of the plaintiff's birth by plaintiff's mother, who was not married to defendant at the time of plaintiff's conception and birth. While it does not appear that the court made a formal finding of paternity, it does appear that defendant executed an acknowledgment of paternity. In any event, the prior paternity action was settled by defendant paying plaintiff's mother approximately $52,000 and purchasing an annuity that would provide $2,764.78 a month until plaintiff reached eighteen years of age and then a lump sum payment of $100,000. In conformity with the stipulation, the prior action was dismissed with prejudice upon the purchase of the annuity. Plaintiff's position is that his right to support could not have been compromised in the earlier settlement.

The heart of this dispute centers on the provisions of the Paternity Act, specifically § 3 of the act, MCL 722.713; MSA 25.493, which provides as follows:

> (a) An agreement or compromise made by the mother or child or by some authorized person on their behalf with the father concerning the support and education of the child shall be binding upon the mother and the child only when the court having jurisdiction to compel support and education of the child shall have determined that adequate provision is reasonably secured by payment or otherwise and has approved the agreement or compromise.
>
> (b) The performance of the agreement or compromise, when so approved, shall bar other remedies of the mother or child for the support and education of the child.

Unlike in a paternity action in a divorce action the parties may not compromise or settle their child's right to receive support. *Johns* v *Johns* , 178 Mich. App. 101, 106; 443 N.W.2d 446 (1989). In fact, while the Paternity Act specifically provides that the parties may reach a settlement that bars future recovery or modification, under the divorce statutes the court having jurisdiction of the matter specifically is empowered to, from time to time, modify a support award upon a showing of a change in circumstance. MCL 552.17(1); MSA 25.97(1). Plaintiff argues that this fundamental difference between a paternity action and a divorce proceeding violates equal protection. We agree.

Classifications based upon illegitimacy violate the Equal Protection Clauses of U.S. Const, Am XIV and Const 1963, art

1, § 2, unless they are substantially related to permissible state interests. *Spada v Pauley*, 149 Mich. App. 196, 203; 385 N.W.2d 746 (1986). The question then is whether the different treatment of legitimate and illegitimate children with respect to the modifiability of an award of support is substantially related to a permissible state interest. We are not persuaded that it is.

Defendant argues that there is a very clear public purpose advanced by allowing the settlement and compromise of support issues in paternity proceedings, namely the promotion of settlement and finality. While those are certainly legitimate state interests in general, we do not perceive a difference in the state interest in settlement and finality between Paternity Act proceedings and divorce proceedings. We note that the argument for settlement and finality in a Paternity Act proceeding is as equally strong or as equally weak as it is in a divorce proceeding. The Legislature has determined that the need to modify child support awards in divorce proceedings outweighs the need for settlement and finality. We fail to see how the need differs with respect to illegitimate children. Therefore, if we accept the Legislature's determination that the need for modification outweighs the need for settlement and finality in a divorce proceeding, then we believe it must follow that the need for modification outweighs the need for settlement and finality in a Paternity Act proceeding as well.

Perhaps historically this weighing of interests was different. The question of the determination of paternity historically was quiet different than it is today. With respect to illegitimate children, there legitimately could be a serious question concerning the actual paternity of the child and methods employed to determine paternity were heavily dependent upon the credibility of the parties and, perhaps, even mere speculation. On the other hand, at least before the abandonment

of Lord Mansfield's Rule in *Serafin v Serafin*, 401 Mich 629; 258 N.W.2d 461 (1977), a husband could not deny the paternity of his wife's child. Thus, a situation existed in which there was a dramatic need to settle the issue or paternity where illegitimate children were concerned, but there was no legal opportunity to settle that question in a divorce proceeding because the husband would be presumed to be the father of the child.

However, both law and medicine have become more sophisticated in recent years, and paternity now may be determined scientifically with a high degree of accuracy utilizing blood tests and DNA testing. Indeed, the Paternity Act itself establishes a presumption of paternity if a blood or a DNA test establishes a probability of paternity of ninety-nine percent or higher. MCL 722.716(5);MSA 25.496(5). On the other hand, with the abandonment of Lord Mansfield's Rule, paternity may now be questioned in a divorce proceeding. As a result, the desirability of settlement of paternity issues has moved from being widely disparate between paternity and divorce proceedings to being essentially the same. Paternity actions have evolved from the parading of witnesses in a courtroom to produce what was ultimately a somewhat speculative answer regarding the question of paternity to the conducting of a blood test resulting in a highly accurate determination of paternity. Meanwhile, the question of paternity in a divorce proceeding has changed from "declarations . . . cannot be admitted to bastardize the issue born after marriage"[1] to the same level of inquiry experienced in a paternity proceeding.

Accordingly, not only has the need to settle a Paternity Act proceeding diminished because the danger of inaccurate determinations of paternity or nonpaternity are now

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[1] *Goodright v Moss*, 2 Cowp 591; 98 Eng Rep 1257 (1777).

minimized, but also, more important to the present inquiry, the need for settlement in a paternity action is now the same as the need for settlement of a paternity question in a divorce proceeding. And, as noted above, because the Legislature has determined in the context of divorce proceedings that the need to allow a modification of child support upon a change in circumstance outweighs the need for settlement and finality, the same conclusion must be applied to paternity actions.

For the above reasons, we conclude that the different treatment between the Paternity Act and divorce proceedings on the child support issue is not substantially related to a permissible state interest. Accordingly, we conclude that MCL 722.713; MSA 25.493 is unconstitutional because it violates equal protection to the extent that it affords the parties to a paternity action greater settlement rights than are afforded parties to a divorce action with respect to the child support issue and to the extent that it renders child support awards under the Paternity Act unmodifiable while child support awards under the divorce statutes remain modifiable.[2] Therefore, plaintiff's action to seek a modification of the earlier support agreement is justiciable, and the trial court erred in granting summary disposition for defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ David H. Sawyer

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[2]We note that we render no opinion whether the Legislature could, if it so chose, modify the divorce statutes to comport with the Paternity Act. We merely rule that the issues of settlement and modification must be treated the same for legitimate and illegitimate children, and, in the absence of a modification to the divorce statute, the more restrictive provisions of the Paternity Act are not enforceable.

/s/ Michael J. Connor

/s/ George R. Corsiglia